Supreme Court, U.S.
FILED
991750 MAY 3 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MANUEL MUÑOZ, JR. and JESUS G. MUÑOZ,
Petitioners,

v.

VERNE ORR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LARRY R. DAVES *
DAVES & ASSOCIATES
405 W. MAGNOLIA AVENUE
P.O. BOX 120126
SAN ANTONIO, TX 78212
(210) 733-3299

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether 2742 members of the certified class of Kelly A.F.B. Hispanic male employees have been denied fundamental fairness by the granting of summary judgment in favor of the Air Force based upon a statistical analysis which was contradicted by other statistical evidence produced by defendant's other experts?

2. Whether the absence of contemporaneous objection to adverse pretrial and discovery orders constitutes a waiver of review and/or limits appellate review to plain error review?

3. Whether the Court in determining a Rule 56 summary judgment motion must consider only evidence which was presented in legally admissible form?

4. Whether the Court below invaded the province of the trier of fact by excluding plaintiffs' statistical analysis?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Manuel and Jesus Munoz individually and on behalf of the class of similarly situated Hispanic male employees of Kelly Air Force Base unlawfully denied promotion opportunities from 1980 through 1992. Petitioners are individuals with no corporate affiliations.

Respondents

Respondent is the Secretary of the U.S. Air Force, F. Whitten Peters.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 6

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT 6

A. The Courts Below Did Not Accord Plaintiffs The Benefit Of Reasonable Inferences In Violation Of Prior Supreme Court Precedent 6

B. The Magistrate's Restrictions on Discovery Violated *Hickman v. Taylor* 10

1. The Magistrate Entered Critical Discovery Orders and Trial Management Orders Which Substantially Prejudiced Plaintiffs and the Class 10

2. The Doctrine Of Waiver Is Inconsistent With The Principle of Liberal Discovery Required By Modern Federal Rules 14

C. The Court's Failure to Consider Plaintiff's Lay Evidence Violate Rule 56 By Requiring Plaintiffs Not Merely to Generate a Genuine Issue of Material Fact But to Establish Their Case on the Merits 19

D. The Court's Rejection of Plaintiff's Statistical Analysis violates *Daubert* 21

CONCLUSION 23

APPENDIX

Appendix A
Court of Appeals Opinion, 1/5/00 . . . . . 1a

Appendix B
District Court Order Following Remand, 1/13/99 . . . . . 27a

Appendix C
Court of Appeals Order, 10/7/98 . . . . . 49a

Appendix D
District Court Order, 7/28/97 . . . . . 53a

Appendix E
Validation Analysis of Promotions at Kelly AFB (10 JAN 94) 57a

TABLE OF AUTHORITIES

CASES:

Akin v. Pafec Ltd.,
991 F.2d 1550 (11th Cir. 1993) 17

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2502 (1986) 7, 10

Celotex Corp. v. Cattrett,
477 U.S. 317, 106 S. Ct. 2548 (1986) . . 7, 10, 19

Coughlin v. Lee,
946 F.2d 1152 (5th Cir. 1991) 12

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993) 13, 21, 22, 23

Henderson v. Carlson,
812 F.2d 874 (3rd Cir. 1987)
cert. denied 484 U.S. 837 (1987) 15

Herring v. New York,
422 U.S. 853 (1975) 14

Hickman v. Taylor,
329 U.S. 495 (1947) 10, 19

Kent v. Johnson,
821 F.2d 1220 (6th Cir. 1987) 17

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 13, 21, 22

McCarthy v. Manson,
714 F.2d 234 (2d Cir. 1983) 15

McCullock v. H.B. Fuller Co.,
61 F.3d 1038 (2d Cir. 1995) *23*

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 13

Merritt v. International Bro. of Boilerworkers,
649 F.2d 1013 (5th Cir. 1981) 15

Mitchell v. Rees,
114 F.3d 571 (6th Cir. 1997) 17

Munoz v. Orr,
200 F.3d 291 (5th Cir. 2000) 21

Neuman v. Rivers,
125 F.3d 315 (6th Cir. 1997) 17

Niehaus v. Kansas Bar Ass'n,
793 F.2d 1159 (10th Cir. 1986) 15

Paquin v. Federal Nat. Mortg. Ass'n,
119 F.3d 23 (D.C. Cir. 1997) 12, 13

Roldan v. Racette,
984 F.2d 85 (2d Cir. 1993) 16

Summers v. State of Utah,
927 F.2d 1165 (10th Cir. 1991) 17

Taylor v. Farrier,
910 F.2d 518 (8th Cir. 1990) 15-16

Thomas v. Arn,
474 U.S. 140 (1985) 16, 18

United States Dominator, Inc. v. Factory Ship Robert E. Resoff,
768 F.2d 1099 (9th Cir. 1985) 15, 17

United States v. Akinola,
985 F.2d 1105 (1st Cir. 1993) 15

United States v. Brown,
79 F.3d 1499 (7th Cir. 1996),
cert denied, 117 U.S. 196 (1996) 15, 16

United States v. Dexter,
165 F.3d 1120 (7th Cir. 1999) 17

United States v. Hall,
716 F.2d 826 (11th Cir. 1983) 16

United States v. Male Juvenile (95-CR-1074),
121 F.3d 34 (2nd Cir.1997) 17

United States v. Smith,
869 F.2d 348 (7th Cir. 1989) 13

United States v. Walters,
638 F.2d 947 (6th Cir. 1981) 16

United Steelworkers of Amer. v. New Jersey Zinc, 828 F.2d 1001
(3rd Cir. 1987) 15

Video Views, Inc. v. Studio 21, Ltd.
797 F.2d 538 (7th Cir. 1986) 16

Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642, 109 S.Ct. 2115 (1989) 14

Wells v. Shriner's Hosp.,
109 F.3d 198 (4th Cir. 1997) 15

Wessmann v. Gittens,
160 F.3d 790 (1st Cir. 1998) 13

Willis v. Sullivan,
931 F.2d 390 (6th Cir. 1991) 15

STATUTES:

28 U.S.C. § 636 (b)(1)(A) 14, 15, 16
28 U.S.C. § 636 (b)(1)(B) 15, 16
28 U.S.C. § 2106 1
28 U.S.C. §1254(1) 1
42 U.S.C. § 2000 e-2(a) 1
Federal Rules of Evidence R. 702 . . . . . 13, 14
Federal Rules of Evidence R. 703 13
Federal Rules of Evidence R. 705 . . . . . 13, 14
Federal Rules of Evidence R. 803(6) 20
Federal Rules of Evidence R. 1006 20

OTHER AUTHORITIES:

Friedenthal, Discovery and Use of an Adverse
Party's Expert Information,
14 Stan. L. Rev. 455 (1962) 13-14

Timothy Perrin, Expert Witness Testimony:
Back to the Future, 29 U.Rich.L.Rev.
1389 (1995) 14

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 200 F.3d 291 (5th Cir. 2000). A copy of the Opinion is included in the Appendix as at Appendix A at 1a-26a. The Order of the District Court on remand for the Western District of Texas is not published. The Order is included in the Appendix B at 27a - 48a. The District Court ordered entry of the final judgment on July 28, 1997 which is printed in Appendix D at 53a to 56a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on January 05, 2000. Petitioners filed a Motion for Extension of Time to file a Petition for Writ of Certiorari. The motion was granted by Honorable Justice Scalia extending the deadline for filing the petition until May 4, 2000. The Petition for Writ of Certiorari has been timely filed. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e-2(a) provides as follows:

> "It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual with respect

to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin".

STATEMENT OF THE CASE

This litigation has a tortured history. This action was brought by Manuel and Jesus Muñoz as a class action in 1982 alleging national origin and sex discrimination at Kelly Air Force Base. The action was initially certified in March of 1983 by an Administrative Judge of the United States Equal Employment Opportunity Commission as a class action and certified by the court below following the Fifth Circuit Court's first remand. The class was defined as " all Hispanic male employees, GS-09 to GS-14 at the SA-ALC, who on or after 2/26/80 were eligible for promotion to positions at grade GS-11 and above at SA-ALC which are covered by Merit Promotion Certificates produced by the Central Civilian Personnel Office at SA-ALC, up to and including the date of 09/26/91."

Plaintiff Muñoz on behalf of 2742 class members challenged the manipulation of the Promotion Process by

Managers/Supervisors and Civilian Personnel Office to favor non-Hispanics employees at Kelly Air Fore Base, Texas. Supervisors/Managers initiate the promotion process by completing a Standard Form 52 (request for personnel action). This same form is used to credit employees with additional experience, by means of retroactive details, reassignments, and non-competitive promotions.

The Promotion Placement and Referral System used by the United States Air Force to sort experience and rank employees for promotions has a data base storing information including Office of Personnel Management basic eligibility requirements, Promotion Evaluation Patterns (PEP) for all positions at Kelly Air Force Base and the qualifications including experience of all employees assigned to Kelly.

The first step after a fill request is received by the Civilian Personnel Office is to search for a PEP for the position to be filled. If one exists, a request is initiated for a Candidate Referral Roster which ranks employees by Proficiency Level Factors (PLF) sorted first by numerical appraisal as adjusted by algorithms, then by awards and, finally, by service computation date. The PPRS system also produces and prints a Disparate Impact Barometer for every PLF. At the end of this process a Merit Promotion Certificate is generated with the names of ten to fifteen employees. The certificate is then forwarded to the selecting official(s).

Among the practices challenged were the funneling of Hispanics males into segregated dead-ended job series that created a glass ceiling for Hispanics at the GS11 level.

At Kelly Air Force Base, plaintiffs complain the manipulation starts with the use of the SF-52 to falsely credit employees with experience to favor women and Anglos. The

PPRS system has in the database multiple PEPS for every job series. Therefore, if a Supervisor/Manager does not get a list which includes the name of favored employee, the manager may request a new listing before a merit promotion is printed. He or she can also change the skill shreds to obtain the favored result. Plaintiffs complaint that these actions were intentionally done to deny promotion opportunities to favor women and Anglos.

The class members in this litigation are part of a workforce constituting twenty-five percent of the total Hispanic workforce of the U.S. Air Force. The Air Force is the largest federal employer of Hispanic civilians. The issue of assuring equality for Hispanic employees is urgent since the latest United States Office of Personnel Management (OPM) report concludes that Hispanic employees are the only minority which continue to be underrepresented in federal civilian employment. The elimination of promotion barriers including both institutionalized and intentional discrimination is a matter of national interest because Hispanics continue to be severely underrepresented at the GS-11 and above grades, nation-wide.

Following the first remand by the Fifth Circuit this action was certified as a class action. Despite the number of class members involved in the litigation the Magistrate Judge limited the plaintiffs and the class to twenty-five (25) witnesses. Access was denied to the secret algorithms used by the Air Force to assess weights to various subjective elements of the annual job performance review and develop the actual appraisal score used to sort and rank candidates. Records were admittedly destroyed which were critical evidence documenting the alleged manipulation of experience, details, and reassignments to favor non-Hispanic candidates. The Air Force developed a database used by their experts

which plaintiffs were denied access to because of the cost of over one million dollars imposed by the Air Force as a condition for obtaining a copy of the database.

Plaintiffs filed a motion to compel production of certain critical documents in their Second Request for Production of Documents. At a hearing on the motion, an agreement was reached on some of the documents in dispute but the Magistrate ruled on four of the areas of dispute including whether defendant should be required to produce SF-52 forms, computer generated media, career enhancement program information, and the Air Force Algorithm used in the process of sorting and ranking candidates based on appraisal scores. The Magistrate denied plaintiffs' request to compel production of the request for personnel action (SF-52) forms on the basis of burdensomeness and expense. On April 26, 1993 the plaintiffs having failed to file objections to the order on the production of the algorithm the Magistrate entered an order removing the documents from the locked vault of the District Clerk and returning the documents to defendant's counsel.

In August of 1993, plaintiffs filed another motion to compel discovery seeking information concerning the Defendant's failure to preserve and the destruction of critical records. In addition plaintiffs sought to compel defendant to answer interrogatories concerning the average time required to progress from each grade level to the next grade and the explanation for the non-selection of the class witnesses for promotions. The Magistrate denied most of the August 1993 motion to compel other than the request for information concerning education provided by the government.

The Magistrate also denied plaintiffs' motion to compel defendant to provide certain computerized data in

merged form. In July 1994, after discovering during the course of the deposition of defendant's expert that he had relied on information derived from the database, Plaintiffs requested that defendant produce the database. Defendant obstructed justice by refusing to provide a copy of the database unless paid the amount of $1,011,195.73. Plaintiffs instead filed a motion to compel discovery of the database. The Magistrate without explaining the basis for his decision denied the motion in August of 1994. The order was not appealed to the District Court.

The Plaintiffs also filed a motion for a finding of adverse inference on issue preclusion based upon defendant's admission of the destruction of records. The Magistrate denied the motion. The Magistrate despite the failure of defendant to timely respond to plaintiff's request for admissions ordered the admissions struck and allowed defendant to respond out-of-time to the requests.

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT

A. The Courts Below Did Not Accord Plaintiffs The Benefit Of Reasonable Inferences In Violation Of Prior Supreme Court Precedent.

The opinion of the Fifth Circuit affirming the granting of summary judgment in favor of the Air Force gives the

movant the benefit of reasonable inferences from the evidence contrary to this Court's holding in *Celotex Corp. v. Cattrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502 (1986). Based entirely upon the Air Force's statistical analysis, the trial Court granted summary judgment in favor of the Air Force over the class claims. The statistical analysis relied upon by the Court below was a summary by year and grade of various personnel actions. The analysis did not examine the extent to which segregation within the job series at Kelly tainted the use of skill codes to determine both basic eligibility for promotion and referral for promotion consideration nor did the analysis consider the role of sex in affecting promotion opportunities.

In Table 1, using the pool of all Kelly GS-09 through GS-12 personnel with the required one year in grade and fully successful or higher performance ratings, Dr. Gould calculated the relevant proportion which Hispanic males, Hispanic females, other males and other females constituted of those eligible for promotion. He then generated a table which provides critical evidence supporting plaintiffs' contention that throughout the class period Hispanic males were deprived of equal promotion opportunities. At Table 1 of the report, Dr. Gould summarized the promotion data for Hispanic males as compared with the Hispanic male proportion of those eligible and qualified for promotion. *See* Appendix E, p. 59a.

Table 2 is another chart compiled by Dr. Gould, showing the extent to which Hispanic males were disadvantaged throughout the class period and supports the inference of class-wide discrimination. *See* Appendix E, p. 60a.

The statistical evidence prepared by the Air Force for Wayne Casio relied upon by the district court in granting summary judgment only shows that Hispanic males are not disadvantaged when Hispanic women are included in the comparison and all job series and grades are lumped together. However, another expert report prepared by Dr. Gould for the Air Force shows that for essentially every year of the class period both Hispanic and non-Hispanic males are severely underrepresented in promotions when the comparison is limited to those objectively qualified-for promotion and when ethnicity by sex is examined.

The sex disparities between those eligible and qualified for promotion and those who actually were promoted at Kelly render the analysis relied upon by the District Court below as essentially meaningless. Cascio's analysis demonstrates that overall Hispanic males were not disadvantaged during the class period only because Cascio lumped together all women and non-Hispanic males in the comparison with Hispanic males.

By lumping Hispanic females with males and non-Hispanic females, the sex disadvantage suffered by Hispanic males was obfuscated. By granting summary judgment based upon defendant's statistical analysis, class members were denied the benefit of favorable inferences which could reasonably be derived from the conflicting statistical data contrary to this Court's previous Rule 56 rulings.

Table 2 provides compelling evidence that the disparities are the result of the operation of Kelly's Affirmative Action Plan. As shown in Table 2, non-Hispanic males were also similarly disadvantaged throughout the class period. Non-Hispanic males also received fewer promotions than expected from 1981 through 1988. The disparities are

not quite as severe for non-Hispanic males as for Hispanic males. However, the disparities support the inference that women were favored during the entire class period.

Moreover, for each year from 1983 through 1992 both Hispanic and non-Hispanic women received a larger proportion of the promotions than expected given their proportion of those qualified for promotion.

The results of a regression analysis based on the 1986-1992 database also supports plaintiffs' allegations of intentional discrimination. Dr. Gould found that Hispanic males had statistically significant higher job performance ratings before promotion than other groups and that the race by sex mean differences in the before promotion job performance ratings and promotion factor ratings are significantly different even when grade education and experience are held constant. Dr. Gould noted that the differences account for only .48 to .57 percent of the variance in ratings so he believed the differences to be of little practical significance.

The Court of Appeals below did not take into consideration the statistical evidence produced by Dr. Gould. This evidence is important because Dr. Gould not only produced statistical evidence supporting the inference of class-wide discrimination throughout the class period but he also questioned whether the use of affirmative action was the source of the disparities and the over-promotion of women throughout the period. This evidence, of course, supports plaintiffs' claim that Kelly A.F.B. manipulated retroactive details, temporary assignments and non-temporary promotions throughout the class period to favor females.

Despite the multitude of procedural obstacles including the refusal by the Air Force to accord access to critical documents and data there is sufficient evidence that the Air Force throughout the class period manipulated the promotion process to unlawfully favor the promotion of women and to deprive Hispanic males of equal employment and promotion opportunities. A primary focus of this litigation was the alleged manipulation of the promotion process and regulations to favor Anglos and women during the class period. This aspect of the lawsuit is supported by Dr. Gould's report and supports the inference that throughout the class period Kelly officials favored women. The favoring of females accounts for of the observed disparity in the promotion rates of other females and Hispanic males. Thus, there is evidence in the record which creates a genuine issue of material fact.

Giving plaintiffs, as non-movants, the benefit of reasonable inferences, this evidence generated a conflict in the statistical evidence which should not have been resolved in favor of the Air Force based upon prior precedent of this Court. *See Celotex Corp. V. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. The Magistrate's Restrictions on Discovery Violated *Hickman v. Taylor.*

1. The Magistrate Entered Critical Discovery Orders and Trial Management Orders Which Substantially Prejudiced Plaintiffs and the Class.

The Magistrate denied a motion to compel defendant to provide a copy of the computer database used by defendant's expert to prepare the statistical analyses thereby

depriving plaintiff of an effective opportunity to cross examine such expert concerning the reliability of the data base or the analysis or to propose alternative explanations for the results obtained.

The Magistrate denied the motion to compel defendant to provide copies of SF-52 (request for personnel action) forms which identify the requesting and authorizing officials and initiate the selection/promotion process thereby depriving the class of evidence needed to prove that officials were manipulating the promotion process by falsely giving favored employees credit for experience through retroactive details and assignments.

The Magistrate also denied plaintiffs' motion to produce the algorithms used to add weight to subjective elements of the appraisals when calculating the total appraisal score during the ranking process. The Magistrate conducted an in-camera inspection of the algorithms and determined the algorithms were not culturally biased and then denied plaintiffs' motion to compel production of the algorithms. The Magistrate, after plaintiffs failed to file objections to the order, then entered an order removing the sealed documents from the locked vault of the District Clerk and returned the instruments to defendant's counsel. As a result, the documents are not part of the record and plaintiffs have been deprived of an effective opportunity to obtain a review of the decision. The Magistrate failed to recognize that the plaintiffs were charging that their equal or higher appraisals than others were converted into values lower than others by the application of the algorithms.

Given the defendant's subsequent challenge to plaintiffs' statistical analysis based upon reliability of the data, the refusal of the Magistrate to grant the motions to compel

substantially prejudiced plaintiffs in making their statistical case of class-wide discrimination.

The pretrial rulings in connection with the discovery orders are normally reviewed under the abuse of discretion standard. Herein, the failure to provide plaintiffs a copy of defendant's computer database, the SF-52's, the algorithms, and the reasons for the non-promotion of plaintiffs and class members deprived class members of meaningful and effective opportunity to establish Title VII liability.

"In Title VII litigation, in which plaintiffs are . . . required to demonstrate pretext, courts have customarily allowed a wide discovery of personnel files. All or some parts of these personnel files could be central to the plaintiffs' effort to prove pretext." *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991)(citations omitted). Pretext can be demonstrated by circumstantial evidence. *Id.* at 1159. The plaintiffs sought discovery of requests for personnel action ("SF-52's") regarding promotions and assignments for which other employees who were arguably less qualified for the actual work were chosen, along with the records of the reasons for non-promotion of plaintiffs and class members. Such evidence is clearly relevant to establish the plaintiffs' *prima facie* case and to establish pretext.

Similarly, the plaintiffs requested discovery of the algorithms used by the defendant to disproportionately weight certain characteristics of candidates for promotion, arguably resulting in unfair discrimination. Such evidence is also plainly relevant both to plaintiffs' *prima facie* case and to considering pretext. *Cf. Paquin v. Federal Nat. Mortg. Ass'n*, 119 F.3d 23 (D.C. Cir. 1997) (Reversing district court's grant of summary judgment as premature when plaintiff needed discovery of underlying narrative evaluations

underlying other employees' numerical performance ratings in order to respond to the defendant's motion for summary judgment. "If [Defendant's] proffered reason is a pretext for discrimination, then comparable evaluations of other [employees] at [Plaintiff's] level are precisely the type of evidence that might enable [Plaintiff] to make his case. *Cf. McDonnell Douglas [Corp. v. Green]*, 411 U.S. 792 at 804 (1973)." *Paquin* at 28).

Rule 703 of the Federal Rules of Evidence requires that an expert's opinion be based on facts and data reasonably relied upon by experts in a particular field." A Court cannot determine whether an opinion is admissible under Rule 703 unless the expert's underlying facts and data are revealed. *See U.S. v. Smith*, 869 F.2d 348 (7th Cir. 1989). An expert must vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with the standards of the expert's profession. *See Wessmann v. Gittens*, 160 F.3d 790, 804-05 (1st Cir. 1998).

Rule 705 of the Federal Rules of Evidence provides that an expert may be required to disclose the underlying facts or data on cross examination. Furthermore, Rule 702 requires that the Court itself evaluate the trustworthiness of the factual basis upon which expert testimony is based. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

In order that the right of cross examination be an effective right, it is critical that the trial court allow preliminary discovery of the underlying facts or data relied upon by the expert. See Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455

(1962). See also Timothy Perrin, Expert Witness Testimony: Back to the Future, 29 U.Rich.L.Rev. 1389 (1995).

Therefore, the failure of the Magistrate to compel defendant to provide plaintiffs with a copy of the computer database precluded plaintiff from effectively cross-examining the expert on the underlying facts as authorized by Rule 705 and also precluded the court from determining the reliability and trustworthiness of the analysis as required by Rule 702 of the Federal Rules of Evidence.

This Court has previously emphasized the critical role of liberal discovery in litigating employment discrimination cases because of the elusiveness of establishing intent and the complexity of establishing disparate impact. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). The pretrial discovery rulings of the Magistrate Judge did not adhere to the liberal spirit of the Federal Rules of Civil Procedure and resulted in fundamental unfairness.

2. The Doctrine Of Waiver Is Inconsistent With The Principle of Liberal Discovery Required By Modern Federal Rules.

Decisions regarding trial procedures are normally reviewed under the abuse of discretion standard. *See Herring v. New York*, 422 U.S. 853, 862 (1975). Such decisions when made by the Magistrate under a § 636(b)(1)(A) assignment are not reviewable by the trial court unless clearly erroneous or contrary to law. A Judge of the [district] court may reconsider any pretrial matter under this subparagraph (A) where it is shown that the Magistrate's order is clearly erroneous or contrary to law.") 28 U.S.C. § 636 (b)(1)(A).

Most circuits have adopted a rule requiring a timely challenge before the district judge of a magistrate's ruling if referred under §636 (b)(1)(B) as a precondition to appellate review. *See United States v. Akinola*, 985 F.2d 1105, 1108 (1st Cir. 1993); *McCarthy v. Manson*, 714 F.2d 234 (2d Cir. 1983); *Wells v. Shriner's Hosp.*, 109 F.3d 198, 200 (4th Cir. 1997); *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991). Some circuits extend this rule to a §636 (b)(1)(A) referral as well. *See Merritt v. International Bro. of Boilerworkers*, 649 F.2d 1013, 1019 (5th Cir. 1981) ("[A]lthough appellants make numerous contentions as to the impropriety of the magistrate's order . . ., they neither appealed this order to the district court nor appealed the final dismissal of the suit, asserting error in the April 23rd order as a ground for relief. Therefore, appellants have waived any arguments relating to the correctness of the magistrate's rulings. . . ."); *United States v. Brown*, 79 F.3d 1499 (7th Cir. 1996), *cert denied*, 117 U.S. 196 (1996); *United Steelworkers of Amer. v. New Jersey Zinc*, 828 F.2d 1001, 1007 (3rd Cir. 1987); *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1164-65 (10th Cir. 1986).

However, other Circuit decisions support the proposition that failure to object before the District Court does not waive the right to appellate review. *See Henderson v. Carlson*, 812 F.2d 874, 878-79 (3rd Cir. 1987) (a party who failed to object to a magistrate's report on an issue referred under §636 (b)(1)(B) has not waived its right to object on appeal to the legal conclusions contained therein), *cert. denied* 484 U.S. 837 (1987); *United States Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1102-03 (9th Cir. 1985) (on review of final judgments, federal courts have jurisdiction to review all interlocutory rulings "that may have affected the outcome of the proceedings in federal court"); *Taylor v. Farrier*, 910 F.2d 518, 520 (8th

Cir. 1990); *United States v. Hall*, 716 F.2d 826, 828-29 (11th Cir. 1983).

This Court has not squarely dealt with the issue in the context of a § 636 (b)(1)(A) referral, but has held that a court of appeals, the Sixth Circuit, may adopt a rule which conditions an appeal from a district court judgment adopting a magistrate's recommendation in a §636 (b)(1)(B) referral, upon the filing of objections with the district court, and such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the court's supervisory power. *Thomas v. Arn*, 474 U.S. 140, 147 (1985). The Supreme Court characterized the Sixth Circuit rule as a rule of procedure, partly because of its prospective application. *Id.* at 145-46. Such rules of procedure, according to the Sixth Circuit, "should promote, not defeat the ends of justice." *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981).

"[B]ecause the rule is a nonjurisdictional waiver provision, the court of Appeals may excuse the default in the interests of justice." *Thomas*, *supra*, 474 U.S. at 155 (footnote omitted). A waiver rule "should not be employed to defeat the 'ends of justice.'" *U.S. v. Brown*, 79 F.3d 1499, 1504 (7th Cir. 1996) (citing *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 540 (7th Cir. 1986) quoting *United States v. Walters, supra*, at 949-950). "Equitable considerations come into play when determining whether an unchallenged pretrial ruling may yet be contested on appeal, and under certain circumstances the failure to file objections may be excused." *Id.* at 1505. Such a rule "is a non-jurisdictional waiver provision whose violation we may excuse in the interest of justice." *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993).

Thus the Seventh Circuit has reviewed challenges to the magistrate's rulings on appeal despite the absence of objections to the magistrate's report in the district court. *U.S. v. Dexter*, 165 F.3d 1120 (7th Cir. 1999). The Second Circuit, despite having adopted a general rule that failure to object may operate as a waiver of further judicial review, held that "because we find that the purposes of the waiver rule are not advanced in the present case, we will permit appellate review." *U.S. v. Male Juvenile (95-CR-1074)*, 121 F.3d 34, 39 (2nd Cir.1997). The Sixth Circuit has reviewed a magistrate judge's rulings in an evidentiary hearing and the district court's referral of a habeas petition and hearing to a magistrate judge although the respondent did not object to the magistrate's report and recommendation and did not object to the hearing. *Mitchell v. Rees*, 114 F.3d 571, 575 (6th Cir. 1997). "[F]ailure to comply [with the requirement for specific objections to a magistrate judge's report] may be excused in the interest of justice." *Neuman v. Rivers*, 125 F.3d 315 (6th Cir. 1997) (citing *Kent v. Johnson*, 821 F.2d 1220, 1222-23 (6th Cir. 1987)). The Tenth Circuit has reviewed a magistrate's report and the district court's analysis of that report when objections were served but apparently not filed as is required, and the district court in failing to exercise its discretion "perforce abused it." *Summers v. State of Utah*, 927 F.2d 1165 (10th Cir. 1991). The Eleventh Circuit, citing *United States Dominator, Inc. v. Factory Ship Robert E. Resoff*, *supra*, held that it has jurisdiction to review a district court's non-final orders when those orders merge into a final judgment of the district court, although there was no objection to the magistrate's report. *Akin v. Pafec Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993).

To require a litigant to challenge every pretrial ruling in order to preserve the right to appellate review does not serve the interests of judicial economy and deprives litigants

of a determination and review by an Article III Court of pretrial decisions which are not clearly erroneous or contrary to law.

In the case at bar, because the district court did in fact conduct a review of the magistrate's report and recommendation, as did the Fifth Circuit as well, refusal to review the magistrate's report would not advance the purposes of the waiver rule to "prevent a litigant from 'sandbagging' the district judge by failing to object and then appealing," *Thomas*, *supra*, 474 U.S. at 148, and prevent the appeals court from being forced "to consider claims that were never reviewed by the district court." *Id.* at 148. "When the district court elects to exercise its power to review a magistrate's report *de novo* and renders an opinion resolving an issue on the merits, there is no danger of 'sandbagging' the district judge," and strict compliance with the rule is not necessary. *Id.* at 158 (Stevens, J., dissenting).

Moreover, equitable considerations weigh heavily in favor of excusing the failure to challenge the pretrial rulings before the District Court. First, the rulings at issue impact not only on the named parties, but affect the absent 2742 members of the class.

Second, the rulings at issue are discretionary decisions delegated by the District Court to the Magistrate in order to promote judicial efficiency. This interest is undermined by requiring litigants to seek District Court review of each pretrial order.

In complex litigation, whether a particular pretrial decision is prejudicial is not always apparent until later in the litigation process after the time for filing objections has

lapsed. Moreover, many of the pretrial decisions at issue are subject to later modification by the Magistrate.

Rigid adherence to the doctrine of waiver encourages sandbagging and hard ball discovery techniques and tactics by litigants which is contrary to the public policy favoring liberal and open discovery. *See Hickman v. Taylor*, 329 U.S. 495 (1947).

Moreover, denial of access to the algorithms, the reasons for the non-promotion of plaintiffs and each of the class witnesses deprived plaintiffs and class members of evidence needed to establish pretext. Therefore, the refusal of the lower Courts to find prejudice has deprived plaintiffs and the putative class of due process.

C. The Court's Failure to Consider Plaintiffs' Lay Evidence Violate Rule 56 by Requiring Plaintiffs Not Merely to Generate a Genuine Issue of Material Fact But to Establish Their Case on the Merits.

This Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, at 324,106 S.Ct. 2548, 2553 (1986) held that the facts on which non-movant relies to defeat the summary judgment motion must be admissible at trial but they need not be in admissible form as presented in the non-movant's opposition to the motion. Herein the Courts below rejected two lay declarations for reasons which violate this Court's holding in *Celotex Corp.*

This first lay declaration was simply a summary generated by compiling the results of reports included in defendant's business records. During the automated job

referral and promotion process, the Air Force generates a report which it identifies as an adverse impact barometer.

Muñoz's declaration merely states that in 88% (1374 of 1555) of the candidate referral rosters these records show an adverse impact upon Hispanic males at the application of basic-eligibility stage of the process.

The plaintiffs argued unsuccessfully below that this declaration was admissible at trial under Rule 1006 of the Federal Rules of Evidence and that the records are admissible under Rule 803(6) of the Federal Rules of Evidence. The Court of Appeals concluded that the trial court had not abused its discretion in striking the affidavit reasoning that the declaration sought to introduce new statistical evidence after an extension for the filing of expert reports had passed.

Plaintiffs unsuccessfully urged below that as a summary of the results of defendant's records the declaration did not constitute an expert report and would be admissible at trial.

The second affidavit rejected by the Court's below consisted of a chart showing that seven of the largest job series accounting for over 50% of the promotions during the class period were extremely segregated on the basis of national origin. This affidavit was rejected below because Galvan, the declarant, is not an expert and therefore can not draw any statistical inferences.

Both of these declarations constitute attempts by plaintiffs faced with the challenge to their own expert's testimony and analysis to show that the statistical analysis upon which the Air Force based its motion for summary judgment was inherently flawed and unreliable.

The statistical analysis advanced through Cascio did not even consider the extent to which Hispanic males are concentrated in dead-ended, ethnically segregated, job series, or that the application of basic eligibility criteria excluded Hispanic males in 88% of the promotions.

That Kelly job series one dead-ended and segregated is knowledge within the preview of a laywitness. Similarly the employer's documents with adverse impact barometer results are admissible as business records. Therefore, both declarations provide evidence which would be admissible at trial.

D. The Court's Rejection of Plaintiff's Statistical Analysis violates *Daubert*.

The Fifth Circuit ruling in this case upheld the district court's exclusion of the analysis and testimony of plaintiffs' expert, Dr. Benz, based on this Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000). The Fifth Circuit articulated the standard for admission of an expert's opinion: "If the basis for an expert's opinion is *clearly unreliable*, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact." *id.* (citations omitted) (emphasis added). The Court further quoted *Daubert*'s holding that if "the trial court concludes that the *scintilla of [expert] evidence* presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment," *id.* (quoting *Daubert, supra*, at 596) (emphasis added).

The Fifth Circuit's analysis, however, relied on criteria which are not the basis for an exclusion of expert testimony under this Court's holdings in *Daubert* or *Kumho*. Although the opinion states that "Dr. Benz' analysis fails to meet the standards for admissibility of scientific evidence in that the district court found that his methods were not in accord with those of experts in his field," *id.* (citing *Kumho Tire Co.*, 119 S.Ct. at 1176), the bases listed for this conclusion do not support it, to wit: (1) that one of the assumptions of the expert analysis is "an *indicator* that he lacked the necessary objectivity to make his analyses *credible*;" (2) that he made "a statement which he later recanted as "*overzealous*;" (3) that he did not consider in his analysis certain other variables as explanations for observed discrepancies in promotion rates; (4) that he did not use a particular methodology, a multiple regression analysis; and (5) that he relied on compilations of data supplied to him by plaintiffs. 200 F.3d 301-302. (emphasis added). None of the stated bases for this conclusion are the sort of criteria noted in *Daubert* as relevant for courts to consider when determining the reliability of an expert's testimony. The fact that there are other methodologies that the expert did not use, that there are differences of opinion as to the relevancy or importance of the factors considered in his analysis, and there are alleged weaknesses in his credibility does not make plaintiff's expert's analysis or conclusions inherently unreliable.

Such weaknesses in the expert's methodologies and attacks on his credibility go to the weight to be given to the expert testimony, not to its admissibility. Even the Fifth Circuit's finding, by the clear meaning of the language used, recognizes that the court is weighing the evidence, not properly determining its admissibility: "Taken cumulatively, the problems with Dr. Benz' expert evidence *indicate* that his

expert testimony *could be unreliable*." 200 F.3d 302. (emphasis added). The parties have the right to have issues of fact resolved by the trier of fact, which means that the court must allow the jury to hear proffered expert testimony unless it is *clearly* unworthy of reliance. The Fifth Circuit's finding that problems with Dr. Benz' expert testimony "*indicate* that [it] *could be unreliable*" does not meet the articulated standard of "clearly unreliable." The ruling in this case violates the court's proper "gatekeeper" function under *Daubert*, according to the cautionary words of the Second Circuit that trial judges must not assume "the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul" and thereby usurp "the ageless role of the jury" in evaluating witness credibility and the weight of the evidence. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1045 (2d Cir. 1995).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____

Larry R. Daves
Daves & Associates
405 W. Magnolia Avenue
San Antonio, Texas 78212
(210) 733-3299

Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed January 5, 2000]

No. 97-50736

JESUS G. MUÑOZ;
MANUEL MUÑOZ, JR.,
Plaintiffs-Appellants,

v.

VERNE ORR; ET AL.,
Defendants,

F. WHITTEN PETERS,
SECRETARY OF U.S.
DEPARTMENT OF THE
AIR FORCE,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

OPINION

Before JOLLY, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This appeal represents the final phase of what has been protracted and difficult litigation for both sides. Plaintiffs allege that the civilian employee promotion system used at Kelly Air Force Base has operated to discriminate against Hispanic males. After a prolonged discovery and motions period, the district court granted the defendant's motion for summary judgment and plaintiffs appealed. Upon initial submission, we ordered a limited remand so that the district court could explain its reasoning with respect to its summary judgment. The district court prepared an order explaining its decision and the parties filed supplemental briefs. We must now decide the issue of whether the district court erred in granting summary judgment for the defendant, given the limited evidence before it.

I. Factual and Procedural History

Plaintiffs Jesus G. Muñoz and Manuel Muñoz, Jr. are Hispanic males, brothers, employed as part of the civilian workforce at Kelly Air Force Base near San Antonio, Texas [Kelly]. They brought this suit on behalf of themselves and all Hispanic male civilian employees at Kelly under Federal Rule of Civil Procedure 23(b)(2). Plaintiffs allege that the promotion system used by the Air Force for civilian employees has a disparate impact on Hispanic males, i.e. that the system results in fewer Hispanic males receiving promotions than would be expected based on the proportion of the civilian workforce at Kelly that they comprise.

An explanation of plaintiffs' claims first requires an understanding of the general context in which hiring and

promotion takes place at Kelly. Civilian employment at Kelly is organized on the "GS" (General Service) scale, a salary and promotions grid in common use throughout civilian federal employment. Each GS level, or grade, represents a salary range. The GS level to which an employee is assigned depends upon such factors as education level, skill level, time in service, and degree of authority of the position he occupies. Over the course of a career in federal civilian employment, an employee may occupy several different GS levels or steps within a GS level. Certain GS levels are not open to employees without particular qualifications (e.g. a college degree or its equivalent). As a general matter, each job opening is allocated to a particular GS level or range of levels, thus setting the maximum salary that position could accrue. A federal civilian job also has skills requirements and responsibilities attached to it that in part define its GS range.

At Kelly, civilian promotions are handled in part by a Merit Promotion Plan that includes an automated system called the "Personnel Placement and Referral System," or PPRS. Under PPRS, employees need not submit applications for promotions. Rather, as a position becomes available, PPRS considers all eligible employees within the defined area of consideration for the position (e.g. Kelly Air Force Base or the entire Air Force). PPRS recursively eliminates employees under increasingly specific job requirements until the desired number of candidates is reached. PPRS thus works like a funnel, at first considering all nominally eligible employees for a promotion and then narrowing the field based on successively more detailed requirements until a short, ranked list is generated. Each stage of this narrowing is known as a "progression level factor," or PLF. Ties between employees are broken by reference to appraisal scores,

awards, and service computation date, in order. The list is hand-checked and then forwarded to the selecting official, who chooses one of the employees for the promotion.

The automated program is not without subjective elements. At the beginning of the promotion process, three-person teams establish and rank the job skills relevant to the position. This ranked list is called a "Promotion Evaluation Pattern," or PEP. The PLFs used by the automated program to narrow the field for a given promotion are derived from these PEPs. Furthermore, within the automated PPRS program, ties between eligible employees are broken in part by appraisal scores and awards and service computation dates. An employee's appraisal scores and receipt of any awards depend, to a large degree, on the discretion of his supervisors. Lastly, after a finite list of names for a promotion has been prepared by the PPRS, a selecting officer chooses one employee from the group. Though the officer's range of choice is limited to the list derived from the PPRS, the actual selection from within the group is left to the selecting officer's discretion. Thus, promotions at Kelly comprise both subjective and objective components that are significantly intertwined.

Plaintiffs filed this action in 1985, alleging sex and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq. Plaintiffs filed this case as a class action under Federal Rule of Civil Procedure 23(b) (2) on behalf of themselves and all other Hispanic male civilian employees, contending that the promotion system at Kelly had an adverse disparate impact

on Hispanic males.[1] In February of 1989, the district court granted summary judgment for defendant, finding that plaintiffs had failed to exhaust their administrative remedies. This Court reversed that initial summary judgment and remanded for further proceedings. *Muñoz v. Aldridge,* 894 F.2d 1489 (5th Cir. 1990).

On remand, the case was referred to a magistrate judge who held a class certification hearing and then recommended that the case be certified as a class action. The class was defined as "all Hispanic male employees, GS-09 to GS-14 at the SA-ALC, who on or after 2/26/80 were eligible for promotion to positions at grade GS-11 and above at SA-ALC which are covered by Merit Promotion Certificates produced by the Central Civilian Personnel Office at SA-ALC, up to and including the date of 09/26/91."[2] The class was certified in accordance with the magistrate's report.

During discovery, plaintiffs sought certain information regarding the Air Force's promotion procedures, including access to the algorithm used in the automated PPRS process.

---

[1] Plaintiffs' focus has shifted somewhat over time. In briefs on this appeal, they contend that they have brought disparate impact and disparate treatment, as well as both individual and class claims.

[2] The SA-ALC referred to in the class definition is the San Antonio Air Logistics Command, the employer of the class members working at Kelly Air Force Base. Merit Promotion Certificates are issued as part of the Merit Promotion Plan, the promotion system which plaintiffs challenge and of which the PPRS is a part.

After an in camera review of the algorithm, the district court denied plaintiffs' request. No objections were filed to that denial. Experts for both sides filed reports. Discovery was re-opened in order to allow plaintiffs' expert, Dr. Benz, to file two additional reports on which he was afterwards deposed by the defense. Plaintiffs also submitted affidavits from certain class members explaining their personal experiences with the promotion system at Kelly. Two plaintiffs, Manuel Muñoz, Jr. and Michael Galvan, submitted additional affidavits containing partial analyses of Kelly's promotion data. After discovery was closed for the second time, upon defendant's motion, the district court ordered summary judgment against plaintiffs.

Plaintiffs appealed the summary judgment to this court. We ordered a limited remand so that the district court could explain its reasoning. We now have before us the original appeal, the district court's order explaining its reasons for granting summary judgment, and supplemental briefs filed by the parties in response to the district court's explanation.

II. *Analysis*

The primary issues raised in this case are whether the district court properly excluded plaintiffs' expert's affidavits as being unreliable, whether plaintiffs' case should survive summary judgment even without their expert's statistical evidence, and whether any individual claims brought by plaintiffs survive the summary judgment order. Plaintiffs also argue that various rulings during the discovery period improperly deprived them of the opportunity to develop their case.

The litigation in the trial court has concentrated on plaintiffs' disparate impact class claims. As discussed below, issues have been raised in this appeal regarding a disparate treatment class claim and both disparate impact and disparate treatment individual claims.

In the context of Title VII litigation, we recognize two types of discrimination claims: disparate treatment and disparate impact. Disparate treatment refers to deliberate discrimination in the terms or conditions of employment, in this case, promotion, on account of race, national origin, or gender. The prima facie elements of a claim for disparate treatment are: (1) that the plaintiff is a member of a protected class under the statute; (2) that he applied and was qualified for a job or promotion for which his employer was seeking applicants; (3) that, despite his qualifications, he was rejected; (4) that afterwards the position remained open and the employer continued to look for candidates with plaintiff's qualifications. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).

Once that showing has been made, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. *See id.* at 802-03. The burden of persuasion, however, remains at all times with the plaintiff. *See Texas Dept. of Community Affairs v. Burdine,* 405 U.S. 248, 253 (1981). In order to win his disparate treatment claim, the plaintiff must then demonstrate that the reason articulated by the employer was pretextual, *see McDonnell Douglas,* 411 U.S. at 805, meaning a pretext for discrimination, per se. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 510-12 (1993). The

plaintiff still bears the burden of showing intent on the employer's part. *See id.*

Disparate treatment claims can be brought as class actions as well. Plaintiffs in a class action disparate treatment case must show a "pattern or practice" of discrimination by the employer, i.e. that "racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. 324, 336 (1977). Proving a pattern or practice is necessary to establishing a prima facie case in a disparate treatment class action: "Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case. . . ." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984).

Disparate impact claims, recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), do not require proof of intent to discriminate. Instead, they focus on facially neutral employment practices that create such statistical disparities disadvantaging members of a protected group that they are "functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). Plaintiffs must identify specific practices as being responsible for any observed disparities, *see Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1367 (5th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994), and must conduct a systemic analysis of those employment practices in order to establish their case. *See Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 63 (5th Cir. 1990). Disparate impact claims may be brought by either individual plaintiffs or a class. In either case, the evidence will focus on the degree of statistical

disparity between protected and non-protected workers in regards to employment or promotion.

A. Standard of Review

We review a grant of summary judgment de novo. *See Frazier v. Garrison Indep. Sch. Dist.*, 980 F.2d 1514, 1520 (5th Cir. 1993); *E.E.O.C. v. Southern Publishing Co.*, 894 F.2d 785, 789 (5th Cir. 1990). Exclusion of expert testimony under Federal Rules of Evidence Rule 702 is within the traditional discretion of the trial court, however, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993), and we review it only for an abuse of discretion which amounts to manifest error. *See Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998) ("With respect to expert testimony offered in the summary judgment context the trial court has broad discretion to rule on the admissibility of the expert's evidence and its ruling must be sustained unless manifestly erroneous"). We also review orders involving discovery under a deferential abuse of discretion standard. *See Geiserman v. MacDonald,* 893 F.2d 787, 789 (5th Cir. 1990); *see also Hodges v. United States,* 597 F.2d 1014, 1018 (5th Cir. 1979).

Because this case involves the exclusion of expert testimony for the purposes of a summary judgment determination, the applicable standards of review overlap somewhat. We will therefore review the district court's exclusion of plaintiffs' expert's evidence and all discovery-related rulings for abuse of discretion, and then review de novo the grant of summary judgment based on the evidence properly before the district court. *See General Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 517 (1997) ("The

question of admissibility of expert testimony is not . . . an issue of fact, and is reviewable under the abuse of discretion standard"); *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 667-68 (5th Cir. 1999) ("We must first review the trial court's evidentiary rulings under an abuse of discretion standard. . . . Then, with the record defined, we must review de novo the order granting summary judgment as a matter of law").

B. Exclusion of plaintiffs' expert evidence

Claims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof. *See Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 987 (1988). Plaintiffs in this case have relied almost exclusively on the statistical analysis contained in the affidavits and testimony of their sole expert, Dr. Benz. On limited remand, the district court explained that it found Dr. Benz' analysis to be unreliable and so did not consider it in reaching the summary judgment ruling.[3]

---

[3] Defendant contends that plaintiffs waived their objections to the exclusion of their expert's report when, after remand, they did not specifically renew their objections in their first supplemental brief. (Plaintiffs did renew their objections in their supplemental reply brief after remand). While a party usually cannot raise an issue for the first time in a reply brief, *see U.S. v. Green,* 46 F.3d 461, 465 n.3 (5th Cir. 1995), plaintiffs are not barred from pressing their objections regarding the exclusion of their expert's testimony here.

In their first brief on this appeal, plaintiffs presented a full argument in favor of the admission of Dr. Benz' testimony. We retained jurisdiction of the case during the limited remand, and

The district court acted well within its discretion in evaluating the reliability of Dr. Benz' evidence at the summary judgment stage: "In considering a Rule 56(c) motion opposed by expert testimony, the trial court has broad discretion to rule on the admissibility of the expert's evidence . . . [and] may inquire into the reliability and foundation of any expert's opinion. . . ." *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988).

If the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact. *See Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993), cert. *denied sub nom, Cooper v. Armstrong Rubber Co.*, 510 U.S. 1117 (1994); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (if "the trial court concludes that the scintilla of [expert] evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment"). Both the determination of reliability itself and the factors taken into account are left to the discretion of the district court consistent with its gatekeeping function under Fed. R. Evid. 702. *See Kumho*

---

specifically allowed the parties to brief any "aspect of [the district court's] reasons not already addressed in their earlier briefs to this court." Since we retained jurisdiction and the original briefs carried over to this phase of the appeal, and because our order did not require the parties to re-brief issues already covered in their first submissions, we find that plaintiffs did not waive their objections to the exclusion of their expert's testimony and therefore consider their arguments here.

Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 1176 (1999).

In its order following remand, the district court explains at length its reasons for rejecting Dr. Benz' reports and testimony for purposes of its summary judgment determination. After a careful review both of the order and the record, we cannot conclude that the district court abused its discretion in excluding plaintiffs' expert reports and testimony.

The facts showing the insufficiency of Dr. Benz' evidence range from particular miscalculations to his general approach to the analysis. For example, in one table Dr. Benz relied on in reaching his conclusions, columns representing Hispanic males and all other employees should add up to 100%, but in seven out of twenty cases they do not. Some of those errors could be attributable to rounding, but no satisfactory explanation was given for totals as low as 25%, 16.67%, and 8.33%. Any reliance on that table was necessarily misplaced.

On a broader level, Dr. Benz' analysis fails to meet the standards for admissibility of scientific evidence in that the district court found that his methods were not in accord with those of experts in his field. *See Kumho Tire Co.*, 119 S.Ct. at 1176 ("The objective of [the gatekeeper requirement] . . . is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). Dr. Benz began his analysis with the assumption that Kelly's promotion system discriminated against Hispanic males, an indicator that he lacked the necessary objectivity to make his

analyses credible. *See Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423 n.2 (5th Cir. 1987). Dr. Benz also stated that discrimination was the "cause" of the disparities he had observed, a statement which he later recanted as "overzealous" since statistics can show only correlation and not causation. *See*, e.g., *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988).

In his depositions, he admitted to failing to consider other variables such as education and experience as explanations for any observed discrepancy between promotion rates and to not performing a multiple regression analysis. *See, e.g., Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988) (holding that failure to control for other explanatory variables makes an expert's table "essentially worthless"). Finally, Dr. Benz relied on the plaintiffs' compilations of data, which gives rise to a "common-sense skepticism" regarding the expert's evaluation, *see Christophersen v. Allied-Signal* Corp., 939 F.2d 1106, 1111 (5th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 912 (1992), overruled on other grounds by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 n.5 (1993), and did not seek to verify the information presented to him. *See Sheats v. Bowen*, 318 F.Supp. 640, 644 (D. Del. 1970).

Taken cumulatively, the problems with Dr. Benz' expert evidence indicate that his expert testimony could be unreliable. Consistent with the role of the district court as "gatekeeper" for scientific evidence, *see General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997), it was not an abuse of discretion on the part of the district court to

exclude Dr. Benz' testimony and reports from the summary judgment evidence.[4]

C. Sufficiency of plaintiffs' other evidence

Having determined that it was not an abuse of discretion for the district court to disregard Dr. Benz' expert reports and deposition testimony, we must now determine whether plaintiffs had other sufficient evidence before the court to survive defendant's summary judgment motion.

A party is entitled to summary judgment if, when the evidence is viewed in the light most favorable to the nonmovant, there are no genuine issues of material fact in dispute. *See Frazier v. Garrison Indep. Sch. Dist.*, 980 F.2d 1514 (5th Cir. 1993); Fed. R.Civ. P. 56(c). To withstand a motion for summary judgment, the nonmoving party must come forward with evidence to support each essential element of its claims on which it will bear the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 712 (5th Cir. 1994). A dispute about a material fact (i.e. one which might affect the outcome of the trial) is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

---

[4] We note that plaintiffs were not denied the opportunity to improve their expert evidence. Dr. Benz filed a total of four reports and was deposed three times. Plaintiffs had sufficient time in which to substantiate their statistical claims, including a reopening of discovery in order to allow Dr. Benz to submit additional reports.

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

With Dr. Benz' evidence excluded, plaintiffs have little else to rely on in attempting to overcome summary judgment on either disparate impact or disparate treatment claims. The primary evidence they cite to consists of indicators of disparate impact gleaned from the defense experts' reports and two declarations filed by individual plaintiffs Manuel Muñoz, Jr. and Michael Galvan. In its order following remand, the district court rejected these latter declarations as untimely filed and endorsed defendant's objections to them.

Plaintiffs rely on reports by defense experts Dr. Wayne Cascio and William Ruch. Plaintiffs point out that according to Dr. Cascio's data, Hispanic males suffered a disparate impact arising from defendant's use of appraisal scores to break ties between employees in the PPRS system that was statistically significant for the year 1987. According to plaintiffs, Dr. Cascio's analysis also shows that Hispanic males received fewer awards than would be expected at statistically significant levels for GS-11 in 1991 and GS-13 in 1987. However, such results do not create a genuine issue of material fact regarding disparate impact or disparate treatment either on their own or taken in combination with all other evidence before the district court. The data points which could suggest disparate impact are isolated in the record and do not support the plaintiffs' allegations of systemic discrimination. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1367 (5th Cir. 1992) (holding that prima facie case of disparate impact requires a "systemic analysis of the [disparate] effects of all promotional criteria for each rank").

Plaintiffs also rely on two declarations filed by class members. The magistrate struck Manuel Muñoz, Jr.'s affidavit filed in October of 1995 in support of plaintiffs' second motion for partial summary judgment. The affidavit was struck on three grounds. First, it was untimely, seeking to introduce new statistical evidence after discovery had already been reopened and closed once to allow plaintiffs to submit additional expert evidence. Second, it used a methodology (the "adverse impact barometer") which the magistrate and plaintiffs' own expert found to be unreliable. Third, since he is not an expert in statistics, Mr. Muñoz was unqualified to advance the statistical evidence contained in the affidavit.

We review a district court's striking of an affidavit for failure to comply with its scheduling order under a deferential abuse of discretion standard. *See Geiserman v. MacDonald,* 893 F.2d 787, 790 (5th Cir. 1990) ("a trial court's decision to exclude evidence as a means of enforcing a pretrial order 'must not be disturbed' absent a clear abuse of discretion") [citation omitted]. It was not an abuse of discretion to strike an affidavit seeking to introduce new statistical evidence after an extension for the filing of such reports had already passed. Because the Muñoz affidavit was properly struck, it was not before the district court and we do not consider it now as part of plaintiffs' summary judgment evidence. *See Barrett v. Atlantic Richfield Co.,* 95 F.3d 375, 382 (5th Cir. 1996).

The other affidavit in issue was filed by Michael Galvan, also a member of the plaintiff class. The affidavit was filed well after the deadline for statistical reports, after even the Muñoz affidavit. In his affidavit, Mr. Galvan states that certain job series had a higher concentration of Hispanic

employees and that certain other job series had a higher concentration of non-Hispanic employees. He further states that there were fewer promotion opportunities above the GS-13 level in the job series with the higher concentration of Hispanic employees. Two charts containing bar graphs depicting promotion by grade for various job series are attached.

Regardless of whether Mr. Galvan could be determined competent to offer statistical evidence and whether the lateness of the affidavit would bar its consideration, the affidavit has deficiencies on its face that render it inadequate as summary judgment evidence for the plaintiffs. First, Mr. Galvan's bar charts reflect the number of Hispanic employees who received certain promotions, not the number of Hispanic *males* in accordance with the class definition in this case. *See Lopez v. Laborers Int'l Union Local 18,* 987 F.2d 1210, 1213-15 (5th Cir. 1993) (describing the importance of using the correct comparison pool in evaluating statistical significance of apparent disparate impact). Second, Mr. Galvan does not state whether the series depicted in his bar graphs represent the entire universe of promotions during the relevant period, making statistical comparisons impossible. Third, allegations regarding concentration of Hispanic employees in certain job series relate more to hiring and initial placement than to promotion decisions, the subject of this lawsuit.

Mr. Galvan does not purport to show, nor is there evidence elsewhere, that any concentration of Hispanic employees in particular job series was due to discrimination rather than differences in which jobs Hispanic employees applied for or other race- and gender-neutral explanations for

any perceived differences. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance"). Finally, Mr. Galvan does not (and indeed could not, if he is not an expert) draw any statistical inferences from the data he presents. The court is unable to perform the necessary analyses for the plaintiffs, particularly without adequate information regarding the universe of promotions included in the affidavit, the selection criteria used in compiling the data, or other such vital information. Upon reviewing the affidavit and other filings in the case, we find that Mr. Galvan's affidavit is not sufficient to raise a genuine issue of material fact regarding plaintiffs' claims.

Taken as a whole, plaintiffs' evidence properly before the district court does not raise a genuine issue of material fact as to either disparate impact or disparate treatment class-wide claims.

D. Failure to identify alleged discriminatory practices with particularity

Defendant alleges that plaintiffs have failed to identify the particular employment practices they challenge and that instead, this case represents an attack on civilian employment generally at Kelly. Plaintiffs counter that their attack is adequately focused.

It is a matter of settled law that a disparate impact class action is not the proper mechanism with which to attack the cumulative effects of an employer's practices. *See Pouncy*

v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982); *see also Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995). Plaintiffs must provide evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 2124 (1989). In the present case, plaintiffs have focused their challenge on a number of different aspects of the promotion system at Kelly over the course of this litigation.[5]

While defendant objects with justification to the shifting focus of plaintiffs' claims, part of the difficulty in this case arises from the nature of civilian promotions at Kelly. Plaintiffs cannot bring a suit challenging an entire employment system; yet where a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for observed discrimination.

In this case, it may be that the overlap between the secret algorithm used by PPRS with individual subjective decisions such as awards during service and selection among a list of candidates would make it difficult to separate out the

---

[5] The complaint broadly alleges discriminatory impact arising from the promotion system as a whole as well as a number of its component parts. Mr. Galvan's affidavit focuses on concentration of Hispanics in dead-end job series. On this appeal, plaintiffs contend that they have satisfied the particularity requirement because they concentrate their attack on defendant's alleged use of experience/skill codes to exclude Hispanic males from promotions.

statistical impact of each portion of the promotion decision. However, plaintiffs have not provided an adequate statistical study of civilian promotions at Kelly from which a court could draw such conclusions. Because we find that plaintiffs have failed to adduce sufficient evidence to create a genuine issue of material fact as to disparate impact or treatment, we need not rule on whether they failed to plead with sufficient specificity the particular aspects of the promotion system they contend are responsible for the discrimination they allege.

E. Discovery limitations and their impact on plaintiffs' ability to develop their case

Plaintiffs object to a number of discovery limitations imposed by the magistrate judge and district court over the course of this litigation. As a preliminary matter, we note plaintiffs' obligation to object contemporaneously to adverse discovery orders. Without such objections, we can only review for plain error. *See Douglass v. United Svcs. Automobile Ass'n,* 79 F.3d 1415 (5th Cir. 1996) (en banc). District courts have considerable discretion in managing discovery. *See Geiserman v. MacDonald,* 893 F.2d 787, 789 (5th Cir. 1990); *see also* Fed. R.Civ. P. 16(b). That broad discretion is particularly important in complex litigation such as this where fairness to all litigants as well as judicial economy require that the length and burdensomeness of discovery and motions be limited. However, that discretion is not unlimited, of course, and a reviewing, court may reverse.

The primary discovery ruling plaintiffs object to is the district court's decision to deny access to the Air Force algorithm used in the PPRS process. The district court

ordered the algorithm sealed following an in camera review of the computer program in which it determined that the algorithm did not contain any evidence of discrimination on the part of the Air Force. Plaintiffs did not object at the time the algorithm was sealed, and it was eventually returned to the Air Force. Due to the lack of contemporaneous objection, we can only review for plain error. Under that standard, we find that the district court was within its discretion in refusing access to the algorithm.

It is unlikely that denial of access to the algorithm unduly prejudiced plaintiffs' claims. Defendant had already supplied detailed information on the overall promotion system and the inputs used by the PPRS automated system. Plaintiffs also already knew what factors were used to break ties between employees and what weight was assigned to each. Denial of access to the algorithm arguably could make it more difficult to identify with specificity the aspects of Kelly's promotion system responsible for any observed disparate impact. However, plaintiffs' claim does not fail on those grounds and therefore a remand to the district court solely because of its denial of access to the algorithm would be inappropriate.

Plaintiffs also object to several other discovery orders by the magistrate and district court. As noted above, we must allow for the district court's discretion in discovery matters, especially in complex litigation. After a thorough and careful review of the record and plaintiffs' objections, we do not find reversible error in any of the district court's discovery orders.

F. Survival of individual claims

Plaintiffs contend that even if this court upholds the summary judgment as against the class action, the individual plaintiffs' claims should survive and should be remanded for trial. The defense counters that this action was brought solely as a class action and that no individual claims were ever pled. On the face of the complaint, no individual claims seem to be alleged, and the bulk of litigation below seems to have been premised on the existence of only a class claim.

However, this case has appeared in this court once before and on that hearing the panel decision makes note of individual claims in addition to the class claim on the face of the complaint. *See Muñoz v. Aldridge*, 894 F.2d 1489, 1491-95 (5th Cir. 1990) (remanding for further consideration class and individual claims). Without full briefing from the parties on this issue, our careful review of the record has not revealed whether the individual claims referred to in the previous opinion from this court were officially dropped from the litigation.[6] In order to give due consideration to plaintiffs' claims given this uncertainty, we examine the summary judgment assuming that some form of individual claims have been brought. We find, however, that any individual claims would also fail to survive summary judgment.

---

[6] The class was certified in this case after the first appeal. The "individual claims" referred to in that opinion -- i.e. those of the named plaintiffs -- could therefore be seen as collapsing into the newly defined class claims to the degree that they were based on the same allegations.

In spite of the inclusion of several individual affidavits in support of plaintiffs' second motion for partial summary judgment (advanced as evidence of *class* discrimination according to the plaintiffs' characterization), the only possible individual claims would be those appearing in the complaint, i.e. those of Jesus and Manuel Muñoz, Jr. *See, e.g., Coon v. Georgia-Pac. Corp.*, 829 F.2d 1563 (11th Cir. 1987) (limiting claims pursuant to Fed. R. Civ. P. 8(a) to those stated in the complaint). It is well established that a class representative cannot have interests adverse to the class, *see* Fed. R. Civ. P. 23(a) (4), nor can individual liability be adjudged before class liability is determined. See *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 569 (5th Cir 1988).

The preliminary question regarding any individual claims is whether we have jurisdiction at all, since summary judgment only as to the class claim would not dispose of the entire case and therefore would not be an appealable final order. Such is not the case, however. In his last motion for summary judgment, defendant requested dismissal of plaintiffs' complaint as a whole, thus putting any individual plaintiffs on notice that summary judgment could be pending against them. The district court's order dismissed "all plaintiffs' claims" with prejudice, disposing of any individual claims along with the class claim. The summary judgment is thus a final and appealable order and its propriety is legitimately before us.

Any individual claims based on disparate impact would fail both because they would be duplicative of class claims in the same action and also because the same statistical proof deemed inadequate for the class would likewise fail to forestall summary judgment on individual claims. *See*

Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 379 (1996) (defeat of class claim is binding on class members' individual claims based on same allegations and facts).

As noted earlier, a prima facie case of individual disparate treatment in promotion must show: that the plaintiff is a member of a protected class, that he was qualified for and applied for a promotion, and that the position remained open and the employer continued to look for candidates with similar qualifications. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden of persuasion remains with the plaintiff, *see Texas Dept. of Community Affairs v. Burdine*, 405 U.S. 248, 253 (1981), and a reviewing court may look to all the evidence submitted to determine whether defendant met its burden of producing a legitimate reason for the employment action. *See In re Royale Airlines, Inc.*, 98 F.3d 852, 856 (5th Cir. 1996) (judgment may be affirmed on any grounds in the record).

The named plaintiffs arguably made out a prima facie case on their individual claims, since the complaint and later-filed affidavits allege the required elements for disparate treatment: that the named plaintiffs are members of a protected class and that they were denied promotions. However, all of the promotion denials challenged by the class, including those of the named plaintiffs, arose from the Merit Promotion Plan at Kelly. The promotion plan itself, including the PPRS algorithm which the district court determined was not probative of any claims of discrimination, is the "reason" for the denial of promotions in issue. Plaintiffs would have to show, therefore, either that there is a genuine issue as to whether the promotion plan indicates intentional discrimination or that the promotions denied them were

somehow capable of being isolated from the promotion system and that purposeful discrimination was behind those employment actions.

Nothing in the record adequately alleges or shows purpose on the part of defendant. A complete failure of proof as to one element requires summary judgment against the entirety of the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Because plaintiffs have not shown any evidence going to purpose, any individual claims based on disparate treatment fail to withstand summary judgment.

We note that the failure of proof on the class claim does not bar all individual class members from bringing their own suits, provided that they do not base their claims solely on issues already adjudicated in this action and that they can show individualized proof of discrimination. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).[7]

---

[7] Plaintiffs suggest that if we find for defendant on the summary judgment issue, we should remand the case for decertification of the class on the grounds that the named plaintiffs have failed to adequately represent the class. First, individual claims based on particularized evidence of discrimination may still be possible for some class members. Second, we cannot say that the named plaintiffs have failed to adequately represent the interests of the class over fourteen years of federal litigation. Decertification is not appropriate merely because the statistical evidence proved inadequate to raise a genuine issue of material fact. The named plaintiffs have zealously sought to vindicate what they see as wrongs to the class and have not failed in their duty of representation.

III. *Conclusion*

This has been protracted and difficult litigation for both sides. We fully appreciate the importance of this case, both in terms of the resources dedicated to it and its impact on the plaintiff class-members' lives. After fourteen years in the federal courts, the case comes before us now on a narrow range of issues for which the scope of our review is narrowly circumscribed. The discovery rulings and the exclusion of plaintiffs' key expert evidence were not an abuse of discretion by the district court. Without statistical proof, dismissal of the class claims was appropriate. Any individual claims have not produced sufficient proof of disparate impact or of purpose necessary to a disparate treatment claim to survive summary judgment.

The summary judgment against all plaintiffs' claims is hereby AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

[Filed January 13, 1999]

No. SA-85-CA-2991-FB

MANUEL MUÑOZ, ET AL.,
Plaintiffs,

v.

F. WHITTEN PETERS, Acting Secretary of the United States Department of the Air Force,
Defendant.

ORDER FOLLOWING REMAND

Pending since 1985, this case was transferred to the undersigned in 1994. In 1995, cross-motions for summary judgment were filed by the parties and a hearing was held. United States Magistrate Judge Robert B. O'Connor found the statistical reports offered by plaintiffs' only expert, Dr. George Benz, wholly insufficient to support plaintiffs' allegations of racial discrimination. Plaintiffs, however, were allowed to rely on two further expert reports submitted by Dr. Benz. The Court reopened discovery to allow the experts to

be deposed regarding these additional reports and the summary judgment motions were stricken subject to reurging. After completion of the additional expert discovery, the parties filed their second cross-motions for summary judgment. "After careful consideration of the pending motions, the pleadings on file and the entire record in this matter, including the proceedings before United States District Judge H. F. Garcia and Magistrate Judge O'Connor," plaintiffs' motion for partial summary judgment was denied and defendant's motion for final summary judgment was granted. Plaintiffs appealed the summary judgment order to the United States Court of Appeals for the Fifth Circuit, which remanded for an explanation of the rationale for granting summary judgment.

Summary judgment was granted in favor of defendant primarily because plaintiffs had wholly failed to produce competent expert summary judgment evidence in support of their challenge to the United States Air Force promotion system for civilian employees and their claim for $300,000,000 in damages. See Teamsters v. United States, 431 U.S. 324, 336 (1977) (plaintiffs cannot prove class-wide discrimination without support of statistical evidence submitted by competent expert). Specifically, the summary judgment in favor of defendant is granted because the record does not raise genuine issues of material fact and because the Court agrees with the analyses and arguments presented: (1) in the Order and Advisory of the Magistrate Judge (docket no. 403), which is incorporated by reference; (2) defendant's second motion for summary judgment and accompanying brief (docket no. 464), which is incorporated by reference; and (3) defendant's submission (contained in the Notice of Filing, docket no 529), which is set forth below:

"Plaintiffs, two male Mexican-American civilian Air Force employees, alleged that they were each denied a promotion at the Air Logistics Center ("ALC") at Kelly Air Force Base ("Kelly") in San Antonio in 1982 in violation of Title VII of the Civil Rights Act of 1964. Based upon these two denials of promotions, plaintiffs brought this class action suit in this Court on behalf of all Mexican-American males employed by Kelly Air Force Base. Plaintiffs challenged virtually every aspect of the Air Force promotion system for civilian employees and sought declaratory and injunctive relief and compensatory damages in the sum of $300,000,000.00.

A. The Merit Promotion Plan

Plaintiffs have challenged the Air Force's automated Personnel Placement and Referral System ("PPRS"). With PPRS, it is no longer necessary for employees to apply for promotions; PPRS automatically considers all individuals in the specified area of consideration. PPRS is often described as working like a funnel - all employees are fed into the top of the funnel and, after the PPRS function is performed, the most qualified individuals for the position to be filled come out the bottom of the funnel. The funneling is done via a series of Progression Level Factors ("PLF"). Each PLF lists the job skills necessary to perform the job to be filled, with each subsequent PLF containing more specific job skills than the preceding PLF. The PLFs are developed from a Promotion Evaluation Pattern ("PEP"). PEPs are created, as needed, by three-person teams and list the various necessary job skills and their relative importance. All individuals who reach the same PLF are considered tied; PPRS uses appraisal scores, awards, and service computation date, in that order,

to break these ties and rank the individuals. The end result of the PPRS process is a roster which lists the candidates in rank order. From the roster a Merit Promotion Certificate is created from which the selecting official selects the candidate(s) for promotion.[1]

B. Procedural Background

Plaintiffs filed this action in this court in November 1985. On February 8, 1989, this Court dismissed the complaint holding that plaintiffs had not exhausted their administrative remedies. Plaintiffs appealed and that decision was reversed and remanded by the Court of Appeals in a decision dated February 28, 1990. Munoz v. Aldridge, 894 F.2d 1489 (5th Cir. 1990).

Thereafter, a class was certified on July 20, 1992, consisting of:

> All Hispanic male employees, GS-09 to GS-14, at the SA-ALC, who on or after February 26, 1980 were eligible for promotion to positions at grade GS-11 and above at SA-ALC which are covered by Merit Promotion Certificates produced by the Central Civilian Personnel Office at SA-ALC, up to and including the date of September 26, 1991.

---

[1] A Merit Promotion Certificate can be used to make multiple selections. In such cases, more than the usual number of candidates are included on the certificate.

Discovery, including depositions of approximately 70 fact and expert witnesses, was completed on June 30, 1994.

Cross-motions for summary judgment were filed by the parties and a hearing was held on February 9, 1995. On February 16, 1995, Magistrate Judge O'Connor issued a Report and Recommendation stating that the statistical reports offered by plaintiffs in support of their contentions were "wholly insufficient" and that plaintiffs' reliance on those reports was "ill-advised." Order at 5, 6. However, because of the length of time this matter had been pending, the Court did not dismiss the action and allowed plaintiffs to rely on two additional expert reports even though these reports were submitted well after the filing deadline.[2] Id. at 6-7. The Court also reopened discovery to allow the experts to be deposed regarding these additional reports. Id. at 7.

After completion of the additional expert discovery, the parties filed their second cross motions for summary judgment. On July 28, 1997, this Court granted defendant's motion for summary judgment and dismissed the action with prejudice. Plaintiffs appealed this decision to the Fifth

---

[2] The first additional report was submitted on September 22, 1994 as an attachment to plaintiffs' opposition to defendant's motion for summary judgment. The second additional report was submitted on December 16, 1994.

Apparently aware of the shortcomings of their expert's reports, plaintiffs tried to add a "rebuttal" expert witness to supplant him and then tried to have their original expert removed from the case with the baseless allegation that he was suffering from a memory loss. Each of these motions was denied. Orders of May 24, 1995 and August 16, 1995.

Circuit. On October 7, 1998, the Fifth Circuit remanded the case to this Court for the limited purpose of explaining the rationale for the July 28, 1997 dismissal. This order provides that explanation.

DECISION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). Furthermore, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Plaintiffs assert that defendant's promotion practices have a disparate impact on the plaintiff class. A disparate impact Title VII case addresses the situation when a facially neutral employment practice has a significant adverse effect on a protected group of individuals. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (plurality opinion); Herbert v. Monsanto Co., 682 F.2d 1111, 1116 (5th Cir. 1982). To make a prima facie showing of disparate impact, plaintiffs must identify particular employment practices,

demonstrate to the Court that those employment practices cause an adverse impact on the protected group, and show that the disparities are "sufficiently substantial" to raise the inference of causation. Watson, 487 U.S. at 994-95; Wards Cove v. Atonio, 490 U.S. 642, 656-658 (1989). The defendant can then rebut the prima facie case by showing that the challenged employment practice is job related. Watson, 487 U.S. at 991; Wards Cove, 490 U.S. at 658-660; Herbert, 682 F.2d at 1116. If defendant successfully shows that an employment practice is job related, then plaintiff must demonstrate that there is an alternative to the challenged practice which would not have a disparate impact while still serving the employer's legitimate business interests. Wards Cove, 490 U.S. at 660-61; Herbert, 628 F.2d at 1116.

Because plaintiffs have brought their case as a class action, they have an additional burden of proof. To prove a prima facie case of class-wide discrimination, plaintiffs must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [They must] establish by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure -- the regular rather than the unusual practice." Teamsters v. United States, 431 U.S. 324, 336 (1977); Lewis v. NLRB, 750 F.2d 1266, 1271, reh. denied, 756 F.2d 882 (5th Cir. 1985). As the Supreme Court stated:

> Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination; rather it must be established by a preponderance of the evidence that "racial discrimination was the company's standard

> operating procedure – the regular rather than the unusual practice." . . . The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision making."

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875-76 (1984) quoting Teamsters, 431 U.S. at 336, 360 n.46. Because a class action plaintiff must show a "systemwide pattern or practice" of discriminatory actions, Teamsters, 431 U.S. at 336, "it is equally clear that a class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved." Cooper, 467 U.S. at 878.

Statistics, thus, are the main focus of a prima facie class action case of disparate impact or disparate treatment. Watson, 487 U.S. at 987 ("evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities"); Teamsters, 431 U.S. at 339. See also Shidaker v. Carlin, 782 F.2d 746, 750 (7th Cir. 1986), vacated on other grounds sub nom. Tisch v. Shidaker, 481 U.S. 1001 (1987); Regents of the University of Wisconsin System, 728 F.2d 911, 914 (7th Cir. 1984). However,

neither the Court nor defendant is "oblig[ated] to assume that plaintiffs' statistical evidence is reliable." Watson, 487 U.S. at 996. "'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.'" Id., quoting Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

Thus, defendant is free to impeach the reliability of statistical evidence, offer rebutting evidence or disparage the probative weight which the plaintiff's evidence should be accorded. Watson, 487 U.S. at 996 citing Dothard, 433 U.S. at 338-39 (Rehnquist, J. concurring in result and concurring in part). See also Wilkins v. University of Houston, 654 F.2d 388, 395 (5th Cir. 1981), cert. denied in relevant part, 459 U.S. 822 (1982) ("because of the significant role that statistics can play in discrimination cases and of their inherently slippery nature, it is imperative that they be used properly").

"In considering a Rule 56(c) motion opposed by expert testimony, the trial court has broad discretion to rule on the admissibility of the expert's evidence and this ruling must be sustained unless manifestly erroneous. The district court may inquire into the reliability and foundation of any expert's opinion to determine its admissibility." Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1123 (5th Cir. 1988). "Rule 703 does not 'make summary judgment impossible whenever a party has produced an expert to support its opinion.' If the basis for the expert's opinion is so unreliable that no reasonable expert could base an opinion on that data, the opinion may be excluded in the district court's determination of whether there is a genuine issue regarding an essential element of the claim." Berry v. Armstrong Rubber Co., 989 F.2d 822, 824 (5th Cir. 1993), cert. denied sub

nom, Cooper v. Armstrong Rubber Co., 510 U.S. 1117 (1994), quoting Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987). See also Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993)(addressing expert testimony, "in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment"). Therefore, if statistical evidence is insufficient to prove a prima facie case of disparate impact or disparate treatment, this Court can dismiss the case pursuant to a motion for summary judgment. Lopez v. Laborers Int'l. Union, 987 F.2d 1210 (5th Cir. 1993).

"Faced with a proffer of expert scientific testimony, [] the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." Daubert, 509 U.S. at 592-93. "The subject of an expert's testimony must be 'scientific . . . knowledge." The adjective 'scientific' implies a grounding in the methods and procedures of science." Id. at 589-90.

Most recently, in General Electric Co. v. Joiner, 118 S.Ct. 512 (1997), the Supreme Court emphasized these functions of the district court in considering proffered expert testimony. The Court explained that the Federal Rules of Evidence "leave in place the 'gatekeeper' role of the trial judge in screening such evidence." 118 S.Ct. at 517. The Court also rejected the Eleventh Circuit's rule imposing a

"stringent" standard of review of a district court's exclusion of expert testimony, holding that, on a motion for summary judgment, "the question of admissibility of expert testimony is not . . . an issue of fact, and is reviewed under the abuse of discretion standard." Id.

As the Fifth Circuit noted, plaintiffs have challenged facially neutral employment procedures that allegedly disfavor Hispanic males. Order of October 7, 1998, at 2. Plaintiffs "have relied almost exclusively on the testimony and reports by a single expert, Dr. George Benz, to support their claim." Id. Thus, if this Court determines that Dr. Benz's analyses are unreliable and/or without foundation, summary judgment for defendant must be granted.[3] Dr. Benz's reports are insufficient.

Despite having submitted four separate reports, plaintiffs' expert has not offered sufficient evidence to support a prima facie case. The shortcomings of Dr. Benz's reports are myriad and range from methodological problems to basic mathematical errors. For instance, plaintiffs rely heavily, in this Court as well as in their brief to the Fifth Circuit, on a

---

[3] This case was brought from the start as a class action. Apart from one paragraph alleging that the two named plaintiffs had been denied promotions (¶10), no individual promotion decisions are even mentioned, much less challenged in the complaint. The paragraph mentioning the named plaintiffs alleges only that these individuals were harmed by the system-wide "employment practices" listed in paragraph 7 of the Complaint and does not allege individualized claims of discrimination. Thus, the only issue before the Court is plaintiffs' allegation of class-wide discrimination and not individual claims of discrimination.

chart labeled Table 5. See Appellant's Brief to the Fifth Circuit, filed November 18, 1997, at 9. This chart was revised multiple times yet still contains obvious and basic errors.

Table 5 sets forth the percentages of Hispanic males versus all others at five grade levels and four steps of the promotion process and purports to show that at each grade level the percentage of Hispanic males decreases at each step of the promotion process. Id. Each pair of percentages reflects the total population of individuals at that step and grade level and, therefore, should add up to 100%. However, seven of the twenty pairs of percentages do not add up to 100%. Some are close - the percentages for GS-12 at the X-118 pool add up to 99.70%. However, others are grossly incorrect - the percentages for GS-15 at the X-118 pool total 58.33%, at Highly Qualified total 25%, at Referrals total 16.67% and at Promotions total only 8.33%. Plaintiffs' expert had no explanation for these obvious discrepancies and insisted that he could continue to rely on these numbers despite the fact that they are obviously erroneous. Benz Deposition 3 at 45, lines 19-25.[4]

There are additional problems with Dr. Benz's statistical analyzes. The law is clear that in order to show

---

[4] Dr. Benz has been deposed three times on his various reports. His first deposition took place on June 22, 23, 28 and 29, 1994. References to this deposition will be noted as "Benz Deposition 1." His second deposition was taken on March 9-10, 1995 and will be referenced as "Benz Deposition 2." His final deposition was taken on August 16-17, 1995 and will be referenced as "Benz Deposition 3."

discrimination, statistical analyses must consider the impact of variables, such as education and experience, that might account for statistical disparities. As the D.C. Circuit has noted, "[a] plaintiff's statistical evidence must therefore focus on eliminating this nondiscriminatory explanation by showing disparities in treatment between individuals with comparable qualifications for the position at issue." Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), cert. denied sub nom., Meese v. Segar, 471 U.S. 1115 (1985). See also Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1290 (5th Cir. 1994), cert. denied, 513 U.S. 1149 (1995) ("plaintiffs made the forbidden assumption that all D&L employees were equally qualified for promotion"); Trevino v. Holly Sugar Corp., 811 F.2d 896, 904 (5th Cir. 1987).

Dr. Benz admitted at his deposition that he failed to consider any variable other than ethnicity while admitting that other variables, such as education and experience, could account for the statistical disparities. Benz Deposition 2 at 145, lines 15-23; Benz Deposition 2 at 144, lines 16-25; 145, lines 1-5. See also id. at 144, lines 6-9. In addition, Dr. Benz failed to perform a regression analysis, which would allow the consideration of multiple factors, preferring instead to perform a z-test which allows consideration of only a single variable. Benz Deposition 3 at 144, lines 15-25. Defendant's expert, Dr. Cascio, testified as to the unsuitability of using the z-test for such an analysis. See Cascio April 1994 Report at 15-16; Cascio September 1995 Report at 2. More importantly, the Fifth Circuit has identified multiple regression analyses as "the best, if not the only, means of proving classwide discrimination . . . where a number of factors operate simultaneously." Wilkins, 654 F.2d at 403. See also Segar, 738 F.2d at 1274 ("regressions seek to prove

race discrimination by testing possible alternative explanations for an observed disparity"). Even Dr. Benz admits that a multivariate analysis is better suited to examine a situation in which multiple variables are considered, stating that "[i]f you're trying to analyze simultaneously a whole bunch of factors at the same time and you don't bundle them up into one, then obviously multivariant analysis would be a better approach." Benz Deposition 1 at 117, lines 13-16. See also Benz Deposition 2 at 129, lines 14-22. Dr. Benz's failure to perform a regression analysis alone is sufficient Grounds to reject his reports as unreliable. See Tagatz v. Marquette University, 861 F.2d 1040, 1045 (7th Cir. 1988) (holding that a failure to control for other variables made the expert's table "essentially worthless").

There are additional methodological problems with Dr. Benz's reports. Dr. Benz freely admitted that he started his analysis with the assumption that there was discrimination at Kelly Air Force Base. Benz Deposition 1 at 138, lines 16-25. As the Fifth Circuit has stated, "[a]n expert who forms as opinion before he begins his research is biased and lacking in objectivity." Viterbo v. Dow Chemical Co., 826 F.2d 420, 423 n.2. (5th Cir. 1987). Dr. Benz's admission of a preconceived bias, combined with his reliance on the invalid z-test, is further compounded by his statements that discrimination was the "cause" of the statistical disparities. As Dr. Benz admitted in his deposition, statistics cannot show causation and his statements to the contrary were "overzealous." Benz Deposition 1 at 127, lines 19-25; 128, line 1; Benz Deposition 3 at 218, lines 17-22; Benz Deposition 2 at 143, line 25; 144, lines 1-5. See also id. at 236, lines 4-13. See also Tagatz, 861 F.2d 1044

("Correlation is not causation"); September 1995 Cascio Report ¶ 5.

Furthermore, Dr. Benz stated several strong conclusions finding discrimination in his reports that he was unable to support and retracted at his depositions. Benz Deposition 2 at 195, lines 15-21; 199, lines 19-25; 200, lines 1-4, 11-16, 20-25; 201, lines 1-3; 227, line 25; 228, lines 1-8. See also Benz Deposition 3 at 191, lines 2-5. Dr. Benz also makes his conclusions seem more compelling than they are by ignoring evidence which does not support his conclusions. Benz Deposition 2 at 187, lines 22-25; 188, lines 1-10. See also Benz Deposition 3 at 265-271.

An additional problem with Dr. Benz's analyses is that he relied on plaintiffs to collate and provide the data upon which he based his opinions. Rule 703 mandates that an expert base his opinion on reliable data. Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1033 (5th Cir. 1984). A "common-sense skepticism" is warranted when plaintiffs are the source of information upon which the expert relied. Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1111 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992); Viterbo, 826 F.2d at 423. See also Cascio Report ¶ 6. This problem was compounded by the fact that plaintiff's record keeping was demonstrably inaccurate. In one year and grade combination examined during defendant's expert's deposition, plaintiffs were missing 83 of 232 promotion records. Cascio Deposition, Day 3, pp. 75-77. Review of the original records showed that these records had been produced to the plaintiffs. Cascio Deposition, Day 3, pp. 99-302; see i.e. Cascio Deposition, Day 3, at 144-45, 148.

Dr. Benz exacerbated the problem of having plaintiffs generate the statistics upon which he relied by failing do perform spot checks to ensure that the information was being compiled properly. See Benz Deposition 2 at 28, lines 6-17. This is wholly unacceptable scientific practice in his field. See Sheats v. Bowen, 318 F. Supp 640, 644 (D. Del 1970) ("[i]n order for an expert to base his opinion on a study it is necessary that he be able to testify from his own knowledge as to the nature and extent of the source from which statistics were gathered"). Dr. Benz also compounded this problem by neither learning nor examining the decisional rules that were used by the plaintiffs in generating the data. See Benz Deposition 3 at 118, lines 5-11. Dr. Benz also violated scientific practice by merely "eyeballing" numbers instead of performing any systematic analysis. Benz Deposition 2 at 288, lines 3-14. See also, 309, lines 7-25; 310, lines 1-14. See also Benz Deposition 3 at 239, lines 21-25; 240, lines 1-11; 243, lines 3-6; 245, lines 18-25; 246, lines 1-7. In addition, Dr. Benz utilized a technique that resulted in substantial "double counting" of individuals, thereby making his analyses incorrect. Benz Deposition 2 at 82, lines 19-25; 83, line 1. See also, Benz Deposition 3 at 115, lines 23-25; 116, line 1.

Finally, Dr. Benz's reports are fatally flawed because of a fundamental misunderstanding of what Title VII prohibits. Dr. Benz testified that there was discrimination whenever Hispanics failed to reach parity with their representation in the workplace. See Benz Deposition 2 at 146, lines 5-22. However, a failure to reach parity is irrelevant to the question of discrimination since affirmative action is expressly not required by Title VII:

> [N]othing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a de facto racial imbalance in the employers work force.

Steelworkers v. Weber, 443 U.S. 193, 205-06 (1979) (emphasis in original). See also Teamsters, 431 U.S. at 340 ("Title VII imposes no requirement that a work force mirror the general population"); 29 C.F.R. § 1614.601(e) ("An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex or national origin"). As the Supreme Court has very clearly stated, "[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" Watson 487 U.S. at 993 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) and citing Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986)). Because Dr. Benz's studies address only whether Hispanic males have achieved parity in promotion events and not whether there has been discrimination, his reports are of no assistance to the Court.

The substantial flaws in Dr. Benz's reports make his reports wholly inadequate to support a prima facie case of disparate impact or disparate treatment. Because plaintiffs relied almost exclusively on Dr. Benz's analysis to make their prima facie case, their complaint must be dismissed.

Defendant's Experts' Reports

Plaintiffs have asserted that even if Dr. Benz's reports are inadequate to show a prima facie case, the complaint should not be dismissed because defendant's experts' reports demonstrate disparate impact. See e.g. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgement at 15-16. In fact, the affirmative statistical evidence provided by defendant demonstrates that there was no discrimination against Hispanic males at Kelly Air Force Base. Defendant produced two expert witnesses, each of whom examined a different portion of the promotion process at Kelly, and whose reports found no discrimination at Kelly. Both Dr. Wayne Cascio and William Ruch are well-qualified experts who performed studies which followed accepted scientific methodology in examining the promotion process as implemented at Kelly.

Dr. Wayne Cascio presented three analyses showing that there was no discrimination at Kelly. First, he examined the employment practices challenged by plaintiffs and showed that Hispanic males are not denied those employment benefits to a statistically significant degree when compared to their representation in the qualified labor pool. Dr. Cascio defined the qualified labor pool as the individuals in the pay grades and job series from which candidates are eligible for promotion. April 1994 Cascio Report at 4. This is the appropriate pool in a promotion case. See Wards Cove, 490 U.S. at 650-652; Hazelwood School District v. United States, 433 U.S. 299, 308 (1977); Herbert, 682 F.2d at 1123. Of the 644 z-tests produced by this analysis, only 37 of the 644 z-tests produced results which were statistically significant. Of those 37 statistically significant results, 35 favored

Hispanic males and only 2 disfavored Hispanic males. Id. at 30.

Dr. Cascio also performed a regression analysis to examine plaintiffs' allegation that appraisal scores and award points prevented Hispanic males from being selected for promotion. None of the 73 appraisal scores analyses showed any statistically significant results. Id. at 6. One of the 56 award points analyses was statistically significant in favor of non-Hispanic males; however, by chance alone you would expect one statistically significant result. Id.

Finally, Dr. Cascio did a regression analysis to examine the bottom line question raised by this litigation, whether Hispanic males received the number of promotions one would expect given their representation in the qualified pool. In order to mirror the PPRS process as it works at Kelly, the comparison pool used was everyone at the lowest PLF from which any individual, even if it was only one person, made the certificate. Cascio Deposition IV at 229-30. This pool was then compared to the pool of individuals who were selected for promotion. April Cascio Report at 31. Of the 12 yearly analyses, only one result was statistically significant and the result disfavored Hispanic males. Of the 60 year-by-grade analyses, only one result was statistically significant and also disfavored Hispanic males. Neither of these results supports a finding of systematic discrimination.

William Ruch's analysis addressed plaintiffs' complaint that the PEP process was being manipulated. Mr. Ruch examined the PEPs for 14 series and grade combinations and his job validation analysis showed that the skills being requested via the PEP and the weights given those skills were

strongly correlated to the requirements of the job being filled. Ruch Report at 11 and attached tables.[5]

Plaintiffs' Failure to Identify Promotion Practices

Defendant's motion for summary judgment must also be granted because plaintiffs failed to identify the promotion practices they claim caused the alleged discrimination. The Supreme Court has held that in order to make a prima facie case of disparate impact discrimination, a plaintiff must identify the specific promotion practices which are causing the statistical disparity. See Watson, 487 U.S. at 994-95; Wards Cove, 490 U.S. at 656-658. Thus, as the Fifth Circuit has held, "the disparate impact model of proof in an employment discrimination case is not [] the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of a company's employment practices." Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982) cited with approval in Anderson, 26 F.3d at 1284. In the instant case, plaintiffs are using the disparate impact model to make exactly the type of wide-ranging attack prohibited by these cases. An example of this can be seen in plaintiffs' inclusion of the Career Enhancement Program in their complaint. Even though the class plaintiffs requested was limited to promotions covered by certificates produced by the Civilian Personnel office at Kelly Air Force Base, plaintiffs sought to challenge Career Enhancement Program ("CEP")

---

[5] Ruch's reports were uncontradicted since plaintiffs provided no evidence to support their allegation that PEPs were being manipulated. Indeed, plaintiffs never identified a single PEP that they allege had been manipulated.

promotions which are produced at Randolph Air Force Base and not subject to the allegedly wrongful practices challenged by plaintiffs.[6] Thus, not only did plaintiffs fail to identify specific promotion practices at Kelly, but failed even to limit their case to the personnel office named in their complaint and request for class certification.

Plaintiffs and their expert's failure to identify specific promotion practices provides an independent ground for the dismissal of their complaint."

CONCLUSION

Plaintiffs also sought to rely on untimely filed non-expert affidavits of Manuel Muñoz, Jr. and Michael Galvan. The reliance is misplaced for the reasons stated in Defendant's Response to Plaintiff's Objections to Defendant's Proposed Order (docket no. 534).

Plaintiffs have failed to provide sufficient and reliable evidence to support a prima facie case of either disparate impact or disparate treatment. Defendant's motion for summary judgment is granted.

ORDERED, SIGNED and ENTERED this 13th day of January, 1999.

---

[6] In addition, defendant's expert showed that Hispanic males receive more CEP promotions than expected given their representation in the pool of CEP registrants. June 1994 Cascio Report at 8.

/s/_____
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed October 7, 1998]

No. 97-50736

JESUS G. MUÑOZ;
MANUEL MUÑOZ, JR.,
Plaintiffs-Appellants,

v.

VERNE ORR; ET AL.,
Defendants,

F. WHITTEN PETERS,
SECRETARY OF U.S.
DEPARTMENT OF THE
AIR FORCE,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ORDER

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

The plaintiffs in a Title VII class action filed on behalf of Hispanic male civilian employees at the Kelly Air Force Base in San Antonio appeal a summary judgment order dismissing all of their claims. Based upon the district court's failure to state its reasons for granting summary judgment, we remand to the district court for the limited purpose of explaining the rationale for its decision.

This suit, now almost thirteen years old, involves a complex statistical claim alleging that facially neutral Air Force employment procedures illegally disfavor the promotion of Hispanic males in civilian positions. The appellants have relied almost exclusively upon testimony and reports by a single expert, Dr. George Benz, to support their claim. The Air Force has sought to discredit Dr. Benz's analysis by challenging its reliability and countering it with statistical evidence from other experts.

After the close of discovery, the Air Force moved for summary judgment on all of the appellants' claims, providing three bases upon which its motion could be granted. First, the Air Force argued that the court should rule the evidence from Dr. Benz inadequate to support a prima facie case of discrimination and thus find there was no genuine issue as to a material fact to take to trial. Second, the Air Force argued

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that the court should exclude the evidence from Dr. Benz as inadmissible under the reliability standards articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), leaving the appellants without any evidence in support of their claim. Third, the Air Force argued that the district court should, relying upon dicta in earlier decisions of this court that have suggested the possibility of a different summary judgment standard in nonjury cases, grant summary judgment based upon its own factual finding that Dr. Benz's testimony would not be convincing at trial. In its order dated July 28, 1997, the district court granted the Air Force's motion without providing any discussion of which of these three reasons, or any other reasons, it had adopted in reaching its decision.

Although Fed. R.Civ.P. 56 does not expressly require that a grant of summary judgment be supported with a statement of reasons, the district court's failure to provide any reasons leaves us "unable to perform our coordinate role of reviewing the decision of the district court because we cannot tell whether the court properly evaluated all of the potentially relevant evidence." Wildbur v. Arco Chemical Co., 974 F.2d 631, 645 (5th Cir. 1992). "'When . . . we have no basis for a district court's decision, because its reasoning is vague or simply left unsaid, there is little opportunity for effective review. In such cases, we have not hesitated to remand the case for an illumination of the court's analysis through some formal or informal statement of reasons.'" McInrow v. Harris County, 878 F.2d 835, 836 (5th Cir. 1989) (quoting Myers v. Gulf Oil Corp., 731 F.2d 281, 284 (5th Cir. 1984)); see also Davis v. Bayless, 70 F.3d 367, 376 (5th Cir. 1995) ("[W]e have required that the district court explain its reasons

in sufficient detail to allow this Court to determine whether the district court applied the proper legal rule.").

The Air Force argues that we need not remand to the district court in this instance because it was "utterly apparent" from the context of the ruling that the basis for the district court's order was the exclusion of Dr. Benz's testimony. Because we have absolutely no indication from the district court that it intended to exclude Dr. Benz's testimony and because it was only one of the possible grounds for summary judgment proffered by the Air Force in its brief, we do not find the district court's reasoning so apparent.

For the foregoing reasons, we retain jurisdiction over this case but make a limited remand to the district court for the sole purpose of providing us with a statement of reasons for its grant of summary judgment. Upon being provided with those reasons, we will consider any requests by the parties to file supplemental briefs addressing any aspect of those reasons not already addressed in their earlier briefs to this court.

REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed July 28, 1997]

No. SA-85-CA-2991-FB

MANUEL MUÑOZ, ET AL.,
Plaintiffs,

v.

F. WHITTEN PETERS, Acting Secretary of the United States Department of the Air Force,
Defendant.

ORDER GRANTING FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Before the Court are plaintiff's motion for partial summary judgment (docket no. 240), plaintiff's motion for partial summary judgment (docket no. 461), defendant's motion for final summary judgment (docket no. 464) and plaintiff's motion for reconsideration of this Court's denial of their motion for judgment and/or for evidence preclusion (docket no. 500). After careful consideration of the pending motions, the pleadings on file, and the entire record in this

matter, including the proceedings before United States District Judge H.F. Garcia and United States Magistrate Judge Robert B. O'Connor, the following Orders are entered:

IT IS ORDERED that plaintiff's motion for partial summary judgment (docket no. 240), plaintiffs' motion for partial summary judgment (docket no. 461) and plaintiffs' motion for reconsideration (docket no. 500) are DENIED;

IT IS FURTHER ORDERED that based on defendant's summary judgment evidence, plaintiffs' response, the pleadings on file and the entire record, defendant's motion for final summary judgment (docket no. 464) is GRANTED such that summary judgment is entered in favor of defendant and against plaintiffs on all plaintiffs' claims. The above-styled and numbered cause is DISMISSED WITH PREJUDICE. Each party is to bear its respective costs. Motions pending with the Court, if any, are denied.

ORDERED, SIGNED and ENTERED this 28th day of July, 1997.

/s/_____
FRED BIERY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed July 28, 1997]

No. SA-85-CA-2991-FB

MANUEL MUÑOZ, ET AL.,
Plaintiffs,

v.

F. WHITTEN PETERS, Acting Secretary of the United States Department of the Air Force,
Defendant.

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause. Pursuant to the Order Granting Final Summary Judgment in favor of Defendant entered this date,

IT IS ORDERED, ADJUDGED and DECREED that defendant's motion for final summary judgment (docket no. 464) is GRANTED such that summary judgment is entered in favor of defendant and against plaintiffs on all plaintiffs' claims. The above-styled and numbered cause is DISMISSED WITH PREJUDICE. Each party is to bear its respective costs. Motions pending with the Court, if any, are denied.

ORDERED, SIGNED and ENTERED this 28th day of July, 1997.

/s/ _____
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX E

VALIDATION ANALYSIS OF PROMOTIONS AT KELLY AFB (10 JAN 94)

Validation Analyses of Promotions at Kelly AFB (10 Jan 94)

There is insufficient data for a detailed promotion system validation and determination of the system's ethnic fairness for Kelly AFB. Available data does, however, permit investigation of several indicators of concurrent and predictive validity and fairness. Specifically, indicators of validity of the promotion ratings, the promotion evaluation profiles (PEPs), and the skill codes are the intended primary focus. Two data sets are available for those analyses.

Data Set 1 is an extract of the centralized civilian personnel data system (PDSC) which resides at Randolph AFB. The file contains historical records which are snap shots of each Air Force civilian employee's record as of September of each year. Select variables for civilians promoted through the Kelly AFB civilian -9Xpersonnel office from January 1986 through August 1992 and who were still at Kelly AFB in September 1992 were extracted (N=2,291). Since career program promotions are not handled at Kelly AFB, 282 "career" promotions during the period are not included in the data base. The sample was restricted to those still at Kelly AFB to minimize criterion (job performance after promotion) error variance that might be induced if the rating data was collected at another base which may have different rating policies and distributions. The variables consist of job performance and promotion rating factor scores before and after promotion; demographic variables such as race, sex, date promoted, experience, and education level; and job information such as series and skill codes. Predictive validity evidence and evidence of bias are the intended uses for this data set.

Data Set 2 consists of Promotion, Placement, and Referral System (PPRS) results from conducting trial GS-11 promotion eligibility analyses using current data at Kelly AFB. PEPs (promotion evaluation profiles) were generated for two of the most populated civilian job series at Kelly AFB (series 1670, Equipment Specialist and 2010, Inventory Management). A separate PEP was generated for each series so there are two groups for analysis. The sample was defined as all GS-11 promotion eligibles in those two series at Kelly AFB. The sample contains personnel who have requested consideration for promotion or reassignment at the GS-11 level so it contain GS-11s and higher who want to be considered for GS-11 positions in those series. Data consist of PPRS progression level outcomes and weighted promotion factor scores from the promotion brief; job performance ratings extracted from current performance plans (hard copy); and demographics such as race, sex, grade and experience extracted from personnel files. Concurrent validity evidence and assessment of bias potential in the promotion system are the intended uses for this data set.

BEST AVAILABLE COPY

Data Set 1 Summary

There were 2,291 civilians promoted to GS-11 through GS/GM-13 at Kelly AFB from 1986 through August 1992 who were still at Kelly in September 1992. Of the 2,291 cases, 2,289 had usable criterion data (job performance and promotion factor ratings) so analyses relating to distributions are based on an N of 2,289. Attachment 1 is an ASCII file of the 2,289 cases. A data layout and printed copy of the first and last 10 records is at Attachment 2. Attachment 3 has some 1- and 3-way distributions for the data set. Attachment 4 has analysis and recoding instructions for the programmer. Correlation and regression analyses (atch 5) are based on an N of 2,108 because an additional 181 cases were missing data on at least one critical experience variable and a correlation missing case analysis option was not available.

Sixty eight percent of the 2,291 promotees are male, 43 percent are hispanic. This raises the question, what percentage of the promotion eligibles were Hispanic? The correct procedure to answer the question would look at the eligibles for each promotion action and calculate the cumulative candidate population. That data is not available. The best available approximation is a by year summary of Kelly GS-09 through GS-12 personnel with the requisite minimum year in grade and fully successful, or higher, performance rating. A brief summary of the promotion eligible Hispanics and Hispanic males and their promotion rates during 1986 through 1992 is presented in Table 1. For Hispanic males, promotions rates are from +1 to -13 percentage points of the eligible population with the relationship showing more disparity in the more recent years. Table 2 gives a much more detailed race by sex breakout of the promotion to eligible relationships. As will be discussed later with Table 2, the eligible/promoted disparity for Hispanic males is possibly due to increased promotions going to females of both races. (Does this reflect Kelly AFB affirmative action policy in action?)

Table 1. GS-11 Through GS/GM-13 Promotions and Eligibles at Kelly AFB

Year Promoted	N	Percent Hispanic	Percent Hsp Males	Eligible Hispanic	Eligible Hsp Male
1986	368	46	36	43	35
1987	417	44	29	45	36
1988	536	43	31	47	36
1989	404	43	30	48	34
1990	91	42	29	47	35
1991	282	41	23	47	34
1992	191	33	21	47	34

Table 2 defines the Kelly GS-09 through GS-12 workforce characteristics for 1980 through 1992. There is apparently no way to get detailed data for the "promotion eligible" population for each promotion action so any comparisons must be made using aggregated promotion and promotion eligible "workforce" population data. The percent promotions of Hispanic males was very close to the population representation prior to 1985 and in one case was 12 percentage points higher. Except for one year (1986), after 1984 there were 5 to 13 percentage points lower Hispanic male promotions than the population representation. The pattern for other males is more variable with the eligible to promoted relationship ranging from +4 to -10 percentage points. Both groups of males, tended to be promoted at a lower rate than we would expect from their promotion eligibles. Conversely, in almost every case, females of any race were promoted at greater rates than would be expected from their ratio of eligibles.

Table 2. Kelly AFB GS-09 Through GS-12 Promotion Eligible Workforce Characteristics and Promotion History to GS-11 Through 13[1,2]

	WORKFORCE CHARACTERISTICS					PROMOTIONS				
		OTHER		HISPANIC			OTHER		HISPANIC	
FY	N	MALE	FEMALE	MALE	FEMALE	N	MALE	FEMALE	MALE	FEMALE
1980	2853	56	11	29	4	321	59	10	26	6
1981	2952	54	11	31	4	572	43	11	43	3
1982	3354	50	12	33	5	401	48	11	36	5
1983	3289	50	12	34	5	514	45	18	32	6
1984	3125	47	12	35	6	440	43	19	32	6
1985	3570	45	12	36	7	579	38	19	30	13
1986	3796	44	13	35	8	360	39	15	36	10
1987	4050	42	13	36	9	417	39	17	29	15
1988	4123	40	14	36	11	536	38	19	31	12
1989	4379	39	14	35	11	404	40	17	30	13
1990	4770	38	15	35	12	91	42	16	29	13
1991	4394	38	15	34	13	282	38	21	23	18
1992	4199	38	15	34	13	191	39	26	21	13

[1]Note: Data are from the Kelly AFB Civilian Personnel Office and are by FY. 1985 promotion data is not available. The 1986 to 1992 data are based on CY, not FY, and are from the Randolph AFB computer files used for Data Set 1. Promotions do not include career program promotions since they are not handled by the Kelly AFB personnel office.
[2]Race by sex cell values are percentiles.

Something in the promotion system has been emphasizing promotion of females. From the Sample 1 regression analyses we know that lower time-in-grade and education levels help account for some of the lower Hispanic male promotion rates but the largest factor accounting for the differences may have been that disproportionately higher percentages of women than men of any race were promoted during that period. In my view, these data are inconclusive in showing support for, or against, the plaintiff claims of disparate promotion treatment for male hispanics. Particularly in the last two years (1991 and 1992) 39 percent of the promotions went to females while they represented only 28 percent of the promotion eligible workforce.

One of the striking features of Table 2 is the changing nature of the GS-09 through GS-12 Kelly promotion eligible workforce. In 1980, 85 percent of the eligibles were males and 15 percent females. By 1992, males decreased to 72 percent and females increased to 28 percent of the eligibles. In that period, Hispanic males actually increased by 5 percent while other males decreased 18 percent. Hispanic females increased 9 percent and other females increased 4 percent.

Other characteristics of the Kelly AFB promoted population are as follows. One percent of the promoted population had less than a high school (HS) diploma, 20% were HS graduates, 30% had some college, 42% had a B.A. degree, 6% had a masters, and .17% had a Ph.D.

Concerning the primary rating data, the job performance and promotion factor ratings immediately prior to promotion (1st previous ratings) were used unless that data was not available (not available N=29). In this case the 2nd previous year's ratings were used as the best available estimate. The after promotion job performance rating (primary criterion) used the ratings from the 2nd year after the promotion unless that rating was not available (N=229). In this case the 1st year after promotion ratings were used as the best available rating. The 2nd year ratings were selected as the preferred rating for use since many supervisors and organizations use an unofficial policy of awarding presumptive fully successful ratings for the first rating period after promotion. They do this because of rating inflation control pressure or lack of opportunity to observe the promotees performing many of the tasks in the performance plan during the first rating period. That first rating period is often a matter of a few weeks or less. The first year's rating occurred within 3 months after promotion for 26% of the cases (those promoted April through June and rated as of 30 Jun). The above rating practice statement is based largely on anecdotal evidence but the median job performance rating the 1st year after promotion is "fully successful" and the median 2nd year rating is "excellent" which supports the use of the 2nd year ratings as a more likely reflection of job performance.

BEST AVAILABLE COPY

A critical criteria and predictor question concerns variance. Job performance ratings are notoriously inflated and this sample consists only of those who performed well enough to be promoted (i.e. is a highly truncated population of high performers). The question becomes, is there sufficient variance to detect relationships where they exist? As Table 3 indicates, the variance is restricted but may be sufficient to identify some relationships with the variables of interest although the size of the relationships will probably be significantly understated. Job performance ratings can range from 0=unsatisfactory to 4=Superior but the range of ratings for this sample is 2-4. The promotion ratings shown are the sum of the 9 factor ratings which themselves can range from 1 to 9. Therefore the sum of promotion ratings can range from 9 to 81. As expected, both the job performance and promotion ratings are skewed at the low end with scores clustered at the high end.

62a

Table 3. Means and Standard Deviation of Ratings

	Mean	Standard Deviation
Job Performance Rating		
Before Promotion	3.09	.774
After Promotion	2.56	.672
Promotion Rating Sum		
Before Promotion	69.98	9.93
After Promotion	65.89	8.71

Job performance and promotion ratings, both before and after promotion, do not show any consistent difference patterns by race and sex (see Table 4). Where there are significant differences, say between Hispanic and other males performance ratings before promotion ($t(1564) = 4.60$, $p < .01$), those differences reverse direction after promotion ($t(1564) = -2.10$, $p < .05$). Using regression analyses (see atch 5), the race by sex mean differences in the before promotion job performance and promotion factor ratings are significantly different ($F(1,2102) = 12.81$; $F(1,2102) = 10.60$, $p < .01$) even when grade, education, and experience are held constant. The differences, however, account for only .48 to .57 percent of the variance in ratings so are of questionable practical significance. There are no significant race by sex or race mean differences in the after promotion ratings when those covariables are held constant.

Table 4. Mean Performance and Promotion Ratings Before and After Promotion

	Hispanic	Other
Performance Ratings		
Before Promotion		
Male	3.18	3.03
Female	3.06	3.14
After Promotion		
Male	2.30	2.41
Female	2.39	2.42
Promotion Ratings Sum		
Before Promotion		
Male	70.73	68.93
Female	70.17	71.24
After Promotion		
Male	65.01	66.08
Female	67.14	67.60

Concerning indicators of convergent validity of the promotion ratings, the correlation between promotion factor ratings before promotion selection and job performance ratings after promotion (predictive validity of the promotion factor ratings) is $r = .18$. (Note: $r \geq .08$ is significant at the .01 and $r > .06$ at the .05 level with $N = 1000$ or more). Race is not significantly related (correlated) to any of the performance or promotion ratings but is negatively related to grade and education level. This means that demographic variables such as grade and education level should be held constant while assessing any race effects related to performance or promotion ratings. Since sex and time in grade (experience) are also significantly related to some of the ratings, their effects should also be taken into account.

The multiple R for predicting after promotion job performance ratings using prior promotion factor ratings as the independent measure is .225 (holding race, sex, grade, time in grade, and education constant). The relationship is not large but is statistically and practically significant and is an important indication of the validity of the promotion factor ratings and demographics in predicting future performance. Some factors which are probably minimizing the size of the validity value obtained are: 1) truncation and restriction in range of the criterion and predictors lowers the size of the correlation; 2) the time interval between the promotion factor ratings and the

criterion (job performance after promotion) ranges from 13 to 24 months and many intervening factors can effect the criterion values such as differences in training, experience, workload, availability of supplies and equipment etc.; 3) the ratees are in new jobs and probably have not reached their maximum potential yet as supported by the correlation between current job performance ratings and months in grade before promotion (r=.23) with a mean of 40 months in grade and a S.D. of 36 months; 4) most ratees have new supervisors and units and those supervisors may have different rating policies and practices then those providing the earlier promotion factor ratings; and so forth. Whatever the causes, the available job performance measure is a weak criterion for validation of the promotion system as indicated by its low relationship with all the other rating, demographic, and experience/skill variables.

Other data analysis results of interest are as follows. There is significant evidence of reliability of the job performance and promotion rating factor ratings as indicated by their intercorrelations of .86 before promotion and .77 after promotion (N=2108). Months in grade at promotion is correlated with promotion rating factors sum (r= .19) and job performance rating (r=.23) indicating that job experience is important for receiving higher promotion and performance ratings. As might be expected, higher education levels complement experience and can shorten months in grade at promotion as indicated by the correlation between months in grade at promotion and education level (r= -.19). Hispanics do have significantly lower education levels (r= -.13) which partially explains why there are no race differences in the relationship between promotion factor ratings and future job performance if education level and experience are taken into account (F(1,2101) = 1.90). The interaction of time in grade and promotion factor ratings significantly improves the prediction of subsequent job performance (F(1,2101) = 3.90).

All things considered, these data provide important information demonstrating the predictive validity of the promotion rating factors. When differences in experience and education are taken into account, there are no significant race differences when using the demographic, experience and promotion ratings to predict future performance (F(1,2101) = 1.90). Since, the focus in the Kelly AFB suit is hispanic males vs others, I checked to see if there were race by sex differences in predicting after promotion job performance and there were none (F(1,2100) = 0.60). Finally, the communications factor which some have charged to be biased against hispanics, is not significantly related to race (r=.01), or to hispanic males (r=.03) or hispanic females (r=-.01). It is modestly related to other males (r=-.09) and to other females (r = .07). There is no evidence of bias in the communications ratings against hispanic males.

Data Set 2 Summary

There are 150 Equipment Specialists (series 1670) and 166 Inventory Management (series 2010) personnel in the data set. Variables in the data set are name, SSN, series, grade, race (1 if hispanic; 0 otherwise), sex (1 if male; 0 otherwise), education, months time in grade (experience), skill level codes, progression level factors (4 for 1670's and 5 for 2010's; 1 if made the progression level and 0 otherwise), total progression level factors passed (1 - 5), job performance rating (superior, excellent, or fully successful; those less than fully successful are automatically excluded by PPRS as not eligible so this restricts the range of personnel in the data base), weighted promotion score using CPAS weights for the specific series, and two additional job performance rating components taken from the individuals' work plans (i.e., the total number of major job elements (range is 10 - 4) and the total of elements rated as exceeded). From these two scores the ratio of job element requirements exceeded was calculated as the principle job performance criterion value for concurrent validation analysis. There are no cases in the sample which failed to meet a job requirements so there are no corrections for failing to meet a standard. (Note: the original intention was to capture subelement ratings as a means to add significant real variance to the job performance ratings but Kelly AFB does not document ratings at the subelement level so the criterion measure used is range restricted.)

For the 1670 series, the CPAS weighted promotion score accounts for 58 percent of the variance in job performance holding progression level factor score, grade, experience, and education level constant. The multiple R for that model was .829 and with a correlation between the CPAS weighted score and the job performance criterion of r=.824 this is a very respectable indication of the concurrent validity of the promotion system. There are no race by sex, sex ($F(1,142) = .28$), or race ($F(1,143) = .83$) effects in predicting the job performance criterion. For the zero order correlations, an r of .159 is significant at the .05 level win an N of 150. Race is not significantly related to any of the other variables for this sample.

The progression level factor (PLF) total score is negatively correlated with the criterion and many of the demographic variables. The negative correlations (-.25, -.24, -.21) between the progression level factor (PLF) score and the job performance rating, weighted promotion score, and generated job performance score for the 1670 series personnel are an artifact of the sample. The promotion roster was run for a GS-11, 1670 series job fill action. Many Kelly AFB GS-11s had applied for a lateral move to the series and at least 30 GS-12s and 4 GS-13s had applied for movement (even with a downgrade) to the series and

666a

grade and made it through PLF Level 1. Most of the 12s and 13s did not make it through PLF 2 and two 12s made it to PLF 3. Only 3 GS-11s made it through PLF 4. (The lateral and grade reduction applicants simply did not have sufficient critical skills to survive the PLF requirements.) Those 11s-13s have more time in grade and higher performance/promotion ratings (but less education) then the GS-09s who were more qualified for the job based on skill coding. This accounts for the unexpected relationships. (Note: traditionally we find that the higher grades have higher average performance/promotion ratings in all job series.)

Table 5 summarizes the racial and education characteristics of those in Series 1670, Sample 2 by PLF. There are 200 cases in the sample. (Note: complete performance plan records were received for only 149 cases so the previous regression analyses are based on an N of 149.) Thirty one percent (61) of the cases met the PLF-1 skills requirements but did not meet the PLF-2 skill requirements. Thirty nine percent (78) met the PLF-2 skill requirements but not PLF-3 and only 1 percent (2) met the PLF-3 skill requirements but did not meet the PLF-4 requirements. Thirty percent (59) of the cases met the final PLF skill requirements. Hispanic males comprise 46.5 percent of the 200 promotion eligibles and 45.8 percent of those making it to the final PLF meaning that there is little difference in their representation in the eligible population and the group making it through the final PLF. Note that education levels increased with

Table 5 Education and Racial Characteristics of PPRS Results for Promotion to GS-11 in Series 1670 by PLF

	HISPANICS				ALL OTHERS			
	MALES		FEMALES		MALES		FEMALES	
PLF	N	ED[1]	N	ED	N	ED	N	ED
4[2]	27	2.96	1	2.0	30	3.09	1	2.0
3[3]	0	-	0	-	2	4.5	0	-
2[4]	38	2.71	2	3.0	37	2.8	1	2.0
1[5]	28	2.54	1	3.0	31	2.6	1	4.0

[1]Education coded: 1=some HS; 2=HS grad; 3=some college; 4=Bachelors degree; 5=post grad & masters
[2]Skill EBG1LU
[3]Skill EBG1LU or BPX
[4]Skill EBG1LU or BPX or CCA
[5]Skill EBG1LU or BPX or CCA or DRA1LU
Note: EBG1LU = Equipment specialist/electronics
BPX = Electronics Engineer
CCA = Electronics Technician
DRA1LU = Production controller/electronics

each progression level. Also, there were consistent small but nonsignificant differences in education levels between the Hispanic males and all others for this sample. Concerning skill qualifications, any of four skill codes were qualifying for basic eligibility with equipment specialist/electronics most qualifying and production controller/electronics least qualifying. The hierarchical nature of the skills qualifications can be seen in the notes section of Table 5.

For the 2010 series, the CPAS weighted promotion scores accounts for 48 percent of the variance in job performance holding grade, experience, and education level constant. The multiple R for that model was .71 and with a correlation between the CPAS weighted score and the job performance criterion of r=.70, this is also a respectable indication of the concurrent validity of the promotion system. The progression level factor score was not relevant in this case since all cases had a total of 5, i.e., there is no variance in this variable. There are no race by sex ($F(1,159) = 1.72$), sex ($F(1,160) = 3.84$), or race ($F(1,161) = 0.32$) effects in predicting the job performance criterion. From the zero order correlations, race is not significantly related to any of the other variables except for education level ($r=-.178$).

As with the Data Set 1, I was unable to come up with a method to quantify and analyze the skills for either the 1670 or the 2010 series data.

All things considered, there is substantial evidence of the concurrent validity of the CPAS weighted factor score. From Data Set 2, there is no evidence of racial or sex bias/differences in either the CPAS weighted factor scores or in the job performance ratings.

R. Bruce Gould

R. Bruce Gould

Attachments:

1 Disk 1. ASCII raw data file from the PDSC file, Data Set 1.
2 Layout of the data on Disk 1 and a printed copy of the first and last 10 records. A layout copy is also on the Disk.
3 1-way distributions of PDSC data set on Disk 1, N=2289
4 Data processing instructions to my programmer and for the record file. Contains variable recoding (e.g. education, race) instructions.
5 Correlation matrix of 21 most significant variables, N=2289 Contains relevant regression problems and t and F tests.
6 Disk 2. Raw data file from Data Set 2.
7 Card image of Data Set 2 first and last 10 records for 1670 and 2010 series.

67a

BEST AVAILABLE COPY

8 Layout of Data Set 2 data
9 Recoding of Data Set 2 education and job performance ratings
10 Intercorrelations, means etc for Data Set 2
11 Regression analyses for 1670 series
12 Regression analyses for 2010 series

MEMO FOR RECORD

10 Jun 95

SUBJECT: Validation Analyses at Kelly AFB

1. Make the indicated changes to the 10 January 1994 report titled: Validation Analyses of Promotions at Kelly AFB.

a. Delete the sentence "1985 promotion data is not available" from the note section at the bottom of page 3. The data were obtained and added to Table 2 but the sentence was not removed from the report draft.

b. Replace the Table 4 on page 6 with the following table:

Table 4. Mean Performance and Promotion Ratings Before and After Promotion

	Hispanic	Other
Performance Ratings		
Before Promotion		
Male	3.15	2.97
Female	3.03	3.14
After Promotion		
Male	2.51	2.58
Female	2.60	2.65
Promotion Ratings Sum		
Before Promotion		
Male	70.38	68.11
Female	69.80	71.17
After Promotion		
Male	64.78	65.76
Female	66.96	67.53

The original table had not been corrected to remove all career program promotions although the analyses used the corrected data base.

2. Add the following table as Table 4A. Table 4A is similar to Table 4 but it permits comparison of Hispanic Males to All Others rather than just to Other Males or Other Females or Hispanic Females.

Table 4A. Mean Performance and Promotion Ratings Before and After Promotion

	Hispanic Males	All Others
Performance Ratings		
Before Promotion	3.15	3.03
After Promotion	2.51	2.60
Promotion Ratings Sum		
Before Promotion	70.38	69.23
After Promotion	64.78	66.45

R. BRUCE GOULD

Supreme Court, U.S.
FILED
JUL 05 2000
CLERK

(2)

No. 99-1750

In the Supreme Court of the United States

MANUEL MUNOZ, JR. AND JESSE G. MUNOZ,
PETITIONERS

v.

F. WHITTEN PETERS, SECRETARY OF
THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11 pp

QUESTIONS PRESENTED

Whether the court of appeals properly affirmed the district court's grant of summary judgment on the ground that petitioners had failed to adduce sufficient admissible evidence to create a genuine issue of material fact respecting promotions at Kelly Air Force Base.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	5, 6, 7
Arizona v. *California*, No. 8, Orig. (June 19, 2000)	6
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986)	5
Cooper v. *Federal Reserve Bank*, 467 U.S. 867 (1984)	6
Daubert v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)	4
General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997)	4
Hickman v. *Taylor*, 329 U.S. 495 (1947)	7
Kuhmo Tire Co. v. *Carmichael*, 526 U.S. 137 (1999)	4
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988)	4

Statute and rules:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 4
Fed. R. Civ. P. 56(c)	2, 4, 5
Sup. Ct. R. 10	5

In the Supreme Court of the United States

No. 99-1750

MANUEL MUNOZ, JR. AND JESSE G. MUNOZ,
PETITIONERS

v.

F. WHITTEN PETERS, SECRETARY OF
THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 200 F.3d 291. The opinion of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered January 5, 2000. On March 15, 2000, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including May 4, 2000. The petition was filed May 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are Mexican-American male civilian employees of Kelly Air Force Base (KAFB). They allege that they were denied promotions at KAFB in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* They filed a civil action claiming that the Air Force's automated Personnel Placement and Referral System (PPRS) has had a disparate impact on promotions for a certified class of 2742 Hispanic males. After extensive discovery, the district court granted summary judgment for the government pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. See Pet. App. 27a-48a. The court of appeals affirmed. *Id.* at 1a-26a.

1. The court of appeals' decision describes the KAFB's civilian hiring and promotion practices. Pet. App. 2a-4a. KAFB employs a Merit Promotion Plan that utilizes an automated system, the PPRS, to generate a pool of candidates for promotion. When positions become available, the PPRS automatically identifies all eligible employees, narrows the pool by successively more detailed requirements, and produces a ranked list of candidates. The list is hand-checked and then forwarded to the selecting official, who chooses one of the candidates for promotion. See *ibid.*

2. Petitioners filed this action in 1985 and asserted that the PPRS had a disparate impact on the promotion prospects of Hispanic males at KAFB. Pet. App. 4a-5a. The case was ultimately certified as a class action, discovery proceeded, experts for both sides filed reports, and affidavits were filed. *Id.* at 5a-6a. At the close of discovery, the government moved for summary judgment, and the district court granted that motion. See *id.* at 6a. Petitioners appealed, and the court of appeals

ordered a limited remand directing the district court to explain its reasoning. See *ibid.* The district court then issued an extensive opinion explaining the basis for its grant of summary judgment. *Id.* at 27a-48a.

3. The court of appeals affirmed the district court's judgment and specifically rejected petitioners' objections to various rulings on the admissibility of petitioners' evidence and on other matters. Pet. App. 1a-26a. The court of appeals concluded that the district court did not abuse its discretion in concluding that petitioner's expert testimony was unreliable and should be excluded. See *id.* at 10a-14a. The court of appeals also agreed with the district court that petitioners' other evidence was not sufficient to survive a motion for summary judgment. See *id.* at 14a-18a. The court specifically found that petitioners "have failed to adduce sufficient evidence to create a genuine issue of material fact as to disparate impact or treatment." *Id.* at 20a. The court of appeals next concluded that the district court had not abused its discretion in limiting discovery. *Id.* at 20a-21a. The court of appeals further ruled, in upholding summary judgment as against the class action, that "any individual claims would also fail to survive summary judgment." *Id.* at 22a; see *id.* at 22a-25a.

ARGUMENT

Petitioners contend that the court of appeals erred in affirming the district court's entry of summary judgment. They argue that the district court (1) failed to give petitioners the benefit of reasonable inferences from the evidence (Pet. 6-10); (2) entered inappropriate discovery orders (Pet. 10-14); (3) wrongly rejected the sufficiency of petitioners' lay evidence (Pet. 19-21); and (4) erred in rejecting petitioners' expert testimony on

the basis that it was unreliable (Pet. 21-23). The court of appeals properly rejected each of those arguments. The legal issues presented here have generated no conflict among the courts of appeals. Instead, they simply involve the application of settled law to the facts of this case. We address petitioners' arguments in the order followed by the court of appeals.

1. Title VII plaintiffs frequently rely heavily on statistics to show disparate treatment or impact. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Petitioners in this case sought to show, through statistical evidence, that the KAFB's procedure for promoting employees disadvantaged Hispanic males. The government argued, in the course of moving for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, that petitioners' evidence was not credible. The court of appeals correctly concluded that the district court properly excluded petitioners' expert testimony because it was unreliable. Pet. App. 10a-14a.

As the court of appeals noted, a district court may exclude from consideration, at the summary judgment stage, expert testimony that is unreliable. Pet. App. 11a. See *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). The court of appeals reviews a district court's determinations respecting the reliability of expert evidence for abuse of discretion. See *Kuhmo Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999); *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141-143 (1997). The court of appeals had ample reason to conclude that the district court here did not abuse its discretion in concluding that petitioner's expert testimony lacked sufficient reliability to create a genuine issue of material fact. See Pet. App. 12a-14a.

As the court of appeals and district court both explained, the expert testimony contained flaws ranging from "particular miscalculations" to errors in the "general approach to the analysis." Pet. App. 12a. For example, petitioners' statistical expert made obvious mathematical errors, he employed methodology that was "not in accord with those of experts in his field," and his analysis rested on an assumption—namely, that the KAFB promotion system was discriminatory—that indicated he "lacked the necessary objectivity to make his analysis credible." *Id.* at 12a-13a. See also *id.* at 37a-43a.

Even if petitioners could overcome the court of appeals' persuasive explanation of why the district court did not abuse its discretion in rejecting, as unreliable, petitioners' expert testimony, the matter would not warrant this Court's review. The Court does not grant a petition for a writ of certiorari merely to examine whether the lower courts have misapplied a properly stated rule of law to the facts of a particular case. See Sup. Ct. R. 10.

2. The court of appeals also properly affirmed the district court's determination that petitioners' other evidence was insufficient to overcome the government's motion for summary judgment. See Fed. R. Civ. P. 56(c). To avoid summary judgment, petitioners had to come forward with sufficient evidence to support each essential element of their claims on which they would bear the burden of proof at trial. See, *e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Petitioners failed to carry that burden.

The court of appeals explained that, once petitioners' unreliable expert testimony was excluded, petitioners had "little else to rely on in attempting to overcome

summary judgment on either disparate impact or disparate treatment claims." Pet. App. 15a. Petitioners contended that the government's expert reports contained data suggesting disparate impact, but the court of appeals explained, "[t]he data points which could suggest such disparate impact are isolated in the record and do not support the [petitioners'] allegations of systemic discrimination." *Ibid.* See *id.* at 44a-46a; see generally *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 875-876 (1984). Furthermore, when the government's expert reports are considered as a whole, they refute petitioners' unsupported factual allegations. See Pet. App. 44a-46a. Contrary to petitioners' assertions (Pet. 6), they do not support a reasonable inference of discrimination or create a genuine issue of material fact warranting a trial. See *Anderson*, 477 U.S. at 248. Moreover, like the ruling on petitioners' expert testimony, the ruling on the government's expert reports simply involves the application of settled law respecting summary judgment to the particular facts of this case. It does not warrant this Court's review.

3. Petitioners also rely on two affidavits that the district court properly refused to consider on the grounds that each was untimely. Pet. App. 15a; see *id.* at 47a. A district court has broad discretion to refuse to consider untimely submissions, and the court of appeals properly concluded that there was no reason to set aside the district court's decisions here. *Id.* at 16a. Cf. *Arizona* v. *California*, No. 8, Original (June 19, 2000), slip op. 11-17 (concluding that the state parties' failure to raise a preclusion argument in a timely manner foreclosed that argument in later proceedings). In any event, as the court of appeals explained, those non-expert affidavits, which purport to reach statistical conclusions, are unreliable. Pet. App. 16a-18a. They do not give rise to

a genuine issue of material fact warranting a trial. See *Anderson*, 477 U.S. at 248.

4. The court of appeals also properly rejected petitioners' challenge to the various discovery orders. Pet. App. 20a. Petitioners assert (Pet. 10) that the restrictions on discovery "violated *Hickman v. Taylor*," 329 U.S. 495 (1947). Petitioners provide no explanation, however, of why *Hickman* supports their argument beyond noting that *Hickman* endorses "liberal" discovery. See Pet. 19.

Petitioners primarily object to the district court's sealing of the PPRS algorithm after the court concluded, through in camera inspection, that the algorithm did not contain any evidence of discrimination. Pet. App. 20a-21a. As the court of appeals noted, petitioners failed to raise a timely objection to the district court's action, and the court's action is therefore reviewable only on the basis of plain error. *Id.* at 20a-21a. The court of appeals further concluded that "[i]t is unlikely that denial of access to the algorithm unduly prejudiced any of [petitioners'] claims." *Id.* at 21a. The court made a "thorough and careful review of the record" and found no reversible error in any of the other discovery orders. *Ibid.* Those fact-specific determinations, which are subject to the abuse-of-discretion standard, raise no issues warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys

JULY 2000